No. 17-155	
Title:	**Erik Lindsey Hughes, Petitioner** **v.** **United States**
Docketed:	August 1, 2017
Linked with 16A1134	
Lower Ct:	United States Court of Appeals for the Eleventh Circuit
Case Numbers:	(15-15246)
Decision Date:	February 27, 2017
Questions Presented	

DATE	**PROCEEDINGS AND ORDERS**
May 19 2017	Application (16A1134) to extend the time to file a petition for a writ of certiorari from May 28, 2017 to July 27, 2017, submitted to Justice Thomas.
May 22 2017	Application (16A1134) granted by Justice Thomas extending the time to file until July 27, 2017.
Jul 27 2017	Petition for a writ of certiorari filed. (Response due August 31, 2017)
Aug 24 2017	Order extending time to file response to petition to and including October 2, 2017.
Sep 22 2017	Order further extending time to file response to petition to and including November 1, 2017.
Nov 01 2017	Brief of respondent United States in opposition filed.
Nov 17 2017	Reply of petitioner Erik Hughes filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Nov 20 2017	DISTRIBUTED for Conference of 12/8/2017.
Dec 08 2017	Petition GRANTED.
Jan 11 2018	Motion to dispense with printing the joint appendix filed by petitioner Erik

	Hughes. **Main Document** **Proof of Service**
Jan 22 2018	Motion to dispense with printing the joint appendix filed by petitioner GRANTED.
Jan 22 2018	Brief of petitioner Erik Hughes filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Jan 24 2018	SET FOR ARGUMENT ON Tuesday, March 27, 2018
Jan 25 2018	Brief amici curiae of Chantell and Michael Sackett, and Duarte Nursery, Inc. filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Jan 26 2018	Brief amicus curiae of Richard M. Re in support of neither party filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Jan 26 2018	Motion for leave to file amici brief filed by Law Professors in support of neither party filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Jan 29 2018	Brief amici curiae of Agricultural Building, Forestry, Livestock, Manufacturing, Mining, and Petroleum Business Interests filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Jan 29 2018	Brief amici curiae of National Association of Criminal Defense Lawyers and the National Association of Federal Defenders filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Jan 29 2018	Brief amicus curiae of Professor Douglas A. Berman filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Feb 07 2018	CIRCULATED
Feb 20 2018	Motion for leave to file amici brief filed by Law Professors in support of neither party GRANTED.
Feb 21 2018	Record requested from the U.S.C.A. 11th Circuit.
Feb 21 2018	Brief of respondent United States filed. (Distributed) **Certificate of Word Count** **Main Document**
Mar 02 2018	Record received from the U.S.D.C. Northern Dist. of Georgia. (1 Envelope, part of the record is Sealed)

Mar 13 2018	Reply of petitioner Erik Hughes filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**

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RECORD AND BRIEFS

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No.

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IN THE

Supreme Court of the United States

ERIK LINDSEY HUGHES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This Court explained in *Marks v. United States*, 430 U.S. 188, 193 (1977), that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'" In *Freeman v. United States*, 564 U.S. 522 (2011), the Court issued a fractured 4-1-4 decision concluding that a defendant who enters into a plea agreement under Fed. R. Crim. P. 11(c)(1)(C) may be eligible for a reduction in his sentence if the Sentencing Commission subsequently issues a retroactive amendment to the Sentencing Guidelines. But the four-Justice plurality and Justice Sotomayor's concurrence shared no common rationale and the courts of appeals have divided over how to apply *Freeman*'s result.

The questions presented are:

1. Whether this Court's decision in *Marks* means that the concurring opinion in a 4-1-4 decision represents the holding of the Court where neither the plurality's reasoning nor the concurrence's reasoning is a logical subset of the other.

2. Whether, under *Marks*, the lower courts are bound by the four-Justice plurality opinion in *Freeman*, or, instead, by Justice Sotomayor's separate concurring opinion with which all eight other Justices disagreed.

3. Whether, as the four-Justice plurality in *Freeman* concluded, a defendant who enters into a Fed. R. Crim. P. 11(c)(1)(C) plea agreement is generally eligible for a sentence reduction if there is a later, retroactive amendment to the relevant Sentencing Guidelines range.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

INTRODUCTION 1

OPINIONS AND ORDERS BELOW 2

JURISDICTION 2

STATUTORY PROVISIONS AND RULES INVOLVED 2

STATEMENT OF THE CASE 4

This Court Issues A 4-1-4 Decision In *Freeman* 4

Mr. Hughes Enters Into A Plea Agreement Under Fed. R. Crim. P. 11(c)(1)(C) And Is Sentenced To 180 Months In Prison. 5

The Sentencing Guidelines Are Amended To Lower The Applicable Sentencing Range, And The District Court Denies Mr. Hughes's Motion To Reduce His Sentence. 7

The Court Of Appeals Affirms, Expressly Noting The Existence Of A Deep And Entrenched Circuit Conflict. 9

REASONS FOR GRANTING THE WRIT 10

I. One Circuit Split Over *Marks* Has Led To Another Circuit Split Over *Freeman*. 10

A. The circuits are split over how to apply *Marks* to this Court's fragmented decisions 11

B. The 10-2 *Freeman* split sharply underscores the courts of appeals' disagreement over *Marks*.....16

II. The Questions Presented Are Important And Recurring. 19

A. The questions presented are important. 19

B. The questions presented are recurring. 23

III. This Case Is An Ideal Vehicle For Answering The Questions Presented And Resolving The Underlying Circuit Conflicts. 26

IV. The Eleventh Circuit Decision Is Wrong And Should Be Reversed. 31

CONCLUSION 34

APPENDIX A — Opinion of the Eleventh Circuit (Feb. 27, 2017) 1a

APPENDIX B — Order of the Northern District of Georgia (Nov. 6, 2015) 16a

APPENDIX C — Sentencing Hearing Transcript in the Northern District of Georgia (Mar. 3, 2014) 31a

APPENDIX D — Guilty Plea and Plea Agreement (Dec. 19, 2013) 50a

APPENDIX E — Motion for Reduction of Sentence (June 15, 2015) 71a

TABLE OF AUTHORITIES

Cases

Baldasar v. Illinois,
446 U.S. 222 (1980) 23

Baze v. Rees,
553 U.S. 35 (2008) 20

Blaine v. United States,
137 S. Ct. 1329 (2017) 24

Chapman v. United States,
137 S. Ct. 625 (2017) 24

City of Burlington v. Dague,
505 U.S. 557 (1992) 23

City of Richmond v. J.A. Croson Co.,
488 U.S. 469 (1989) 20

Crawford v. Marion Cty. Election Bd.,
553 U.S. 181 (2008) 20

Dorsey v. United States,
567 U.S. 260 (2012) 25

Eastern Enterprises v. Apfel,
524 U.S. 498 (1998) 14

Franklin Cty. Convention Facilities Auth. v. Am. Premier Underwriters, Inc.,
240 F.3d 534 (6th Cir. 2001) 14

Freeman v. United States,
564 U.S. 522 (2011) ...1, 4, 5, 8, 9, 17, 21, 23, 25, 33

Fuentes v. United States,
137 S. Ct. 627 (2017) 24

Gilmore v. United States,
No. 16-7953, 2017 WL 661819 (U.S. June 19, 2017)..... 24

Gregg v. Georgia,
428 U.S. 153 (1976) 11, 20

Grutter v. Bollinger,
539 U.S. 306 (2003) 23

Hodgson v. Minnesota,
497 U.S. 417 (1990) 13

J. McIntyre Machinery, Ltd. v. Nicastro,
564 U.S. 873 (2011) 20

King v. Palmer,
950 F.2d 771 (D.C. Cir. 1991)..... 12, 33

Marks v. United States,
430 U.S. 188 (1977) 1, 11, 12, 31

McCray v. New York,
461 U.S. 961 (1983) 19

McDonald v. City of Chicago,
561 U.S. 742 (2010) 20

McNeese v. United States,
137 S. Ct. 474 (2016) 24, 29

Medtronic, Inc. v. Lohr,
518 U.S. 470 (1996) 21

Memoirs v. Massachusetts,
383 U.S. 413 (1966) 12

Nat'l Fed'n of Indep. Bus. v. Sebelius,
567 U.S. 519 (2012) 20

Negrón v. United States,
No. 16-999, 2017 WL 636003 (U.S. June 26, 2017)..... 24

Nichols v. United States,
511 U.S. 738 (1994) 1, 16, 23, 25

Parella v., Ret. Bd. of the Rhode Island Emps.' Ret. Sys.,
173 F.3d 46 (1st Cir. 1999)..... 15

Pennsylvania v. Delaware Valley Citizens' Council for Clean Air,
483 U.S. 711 (1987) 23

Peugh v. United States,
133 S. Ct. 2072 (2013) 25

Planned Parenthood of Se. Pennsylvania v. Casey,
947 F.2d 682 (3d Cir. 1991)..... 13

Planned Parenthood of Se. Pennsylvania v. Casey,
505 U.S. 833 (1992) 20

Rapanos v. United States,
547 U.S. 715 (2006) 15

Regents of Univ. of Cal. v. Bakke,
438 U.S. 265 (1978) 20, 23, 24

Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.,
559 U.S. 393 (2010) 21

Sullivan v. United States,
No. 16-7182, 2017 WL 2621326 (U.S. June 19, 2017)..... 24

Tyler v. Bethlehem Steel Corp.,
958 F.2d 1176 (2d Cir. 1992)..... 13

United States v. Alcan Aluminum Corp.,
315 F.3d 179 (2d Cir. 2003)..... 14

United States v. Austin,
676 F.3d 924 (9th Cir. 2012) 24

United States v. Benitez,
822 F.3d 807 (5th Cir. 2016) 18

United States v. Brown,
653 F.3d 337 (4th Cir. 2011) 18, 19

United States v. Browne,
698 F.3d 1042 (8th Cir. 2012) 18

United States v. Davis,
825 F.3d 1014 (9th Cir. 2016) 10, 12, 13, 17, 18, 31, 32, 33

United States v. Dixon,
687 F.3d 356 (7th Cir. 2012) 18

United States v. Duvall,
705 F.3d 479 (D.C. Cir. 2013)..... 24

United States v. Duvall,
740 F.3d 604 (D.C. Cir. 2013)..... 32

United States v. Epps,
707 F.3d 337 (D.C. Cir. 2013).....10, 12, 17, 18

United States v. Graham,
704 F.3d 1275 (10th Cir. 2013) 18

United States v. Howell,
541 F. App'x 13 (2d Cir. 2013)..... 18

United States v. Hughes,
849 F.3d 1008 (11th Cir. 2017) 2

United States v. Johnson,
467 F.3d 56 (1st Cir. 2006)..... 13, 15

United States v. Mitchell,
500 F. App'x 802 (11th Cir. 2012) 24

United States v. Rivera-Martínez,
665 F.3d 344 (1st Cir. 2011)..... 18

United States v. Robison,
505 F.3d 1208 (11th Cir. 2007) 16

United States v. Smith,
658 F.3d 608 (6th Cir. 2011) 18

United States v. Thompson,
682 F.3d 285 (3d Cir. 2012)..... 18

Webster v. Reproductive Health Services,
492 U.S. 490 (1989) 13, 20

Williams v. Illinois,
567 U.S. 50 (2012) 20

Statutes

18 U.S.C. § 3582(c)(2) 2, 4, 7, 8, 34

28 U.S.C. § 1254(1) 2

Rules

Fed. R. Crim. P. 11(c)(1)(C) 3, 4, 7, 34

U.S.S.G. § 1B1.10 (U.S. Sentencing Comm'n Nov. 2015) 7, 30

U.S.S.G. § 1B1.10(b)(2)(A) (U.S. Sentencing Comm'n Nov. 2015) 8

U.S.S.G. § 1B1.10(b)(2)(B) (U.S. Sentencing Comm'n Nov. 2015) 8

U.S.S.G. § 1B1.10(d) (U.S. Sentencing Comm'n Nov. 2015) 21

U.S.S.G. § 1B1.10 cmt. note 3 (U.S. Sentencing Comm'n Nov. 2015) 29

Other Authorities

Brief in Opposition, *Blaine v. United States*,
No. 16-6574 (U.S. Feb. 6, 2017) 27

Brief in Opposition, *Chapman v. United States*,
No. 16-5969 (U.S. Nov. 16, 2016) 27

Brief in Opposition, *Fuentes v. United States*, No. 16-6132 (U.S. Nov. 23, 2016) 27

Brief in Opposition, *Gilmore v. United States*, No. 16-7953 (U.S. May 19, 2017) 27, 30

Brief in Opposition, *McNeese v. United States*, No. 16-66, 2016 WL 6082343 (U.S. Oct. 14, 2016) 24, 25, 27, 29, 31, 32

Brief in Opposition, *Negrón v. United States*, No. 16-999 (U.S. May 19, 2017) 27

Brief in Opposition, *Sullivan v. United States*, No. 16-7182 (U.S. May 15, 2017) 27, 30

Eugene Wambaugh, *The Study of Cases* § 48 (2d ed. 1894) 33

Initial Brief of Appellant, *United States v. Hughes*, No. 15-15246-C, 2016 WL 1376175 (11th Cir. Mar. 14, 2016) 28

James F. Spriggs, II & David R. Stras, *Explaining Plurality Decisions*, 99 GEO. L.J. 515 (2011) 14, 24

Ryan C. Williams, *Questioning* Marks*: Plurality Decisions and Precedential Constraint*, 69 STAN. L. REV. 795 (2017) 10, 21

U.S. Sentencing Comm'n, *2014 Drug Guidelines Amendment Retroactivity Data Report* (Oct. 2016), *available at* http://tinyurl.com/USSC2014 (last visited July 23, 2017) 22

U.S. Sentencing Comm'n, Proposed Amendments to the Sentencing Guidelines (Dec. 19, 2016) 22

INTRODUCTION

Every regional circuit has weighed in on a question that has them irreconcilably split, 10-2. And the only reason they are split is that this Court has never resolved a foundational question about a situation where this Court resolves a case without a majority opinion. In *Marks v. United States*, 430 U.S. 188 (1977), this Court directed lower courts to follow the opinion representing the "narrowest grounds." But this Court has never explained what to do when the opinions are not narrower or broader, but just *different*.

As this Court has observed, in the 40 years since *Marks* was decided, its rule has been "more easily stated than applied." *Nichols v. United States*, 511 U.S. 738, 745 (1994). The lower courts are hopelessly confused over how to apply *Marks*, which has led to several different circuit splits. Among them is the split implicated here over what to make of the fragmented decision in *Freeman v. United States*, 564 U.S. 522 (2011). In *Freeman*, this Court splintered on the circumstances under which a defendant can seek a sentence reduction when the Sentencing Commission reduces the Guidelines range.

This Court should address the *Marks* question now: It matters for Mr. Hughes and for other criminal defendants, and it matters more generally for courts attempting to determine which rule of law to follow in several areas in which this Court has issued a fragmented decision. Indeed, this Court has granted certiorari on at least three prior occasions to resolve a specific question for a *second* time because the lower

courts could not derive the precedential rule from the original fragmented decision.

The Circuits are expressly and irrevocably split on the application of *Marks* to *Freeman*. And unlike previous petitions that raised the *Freeman* issue and were denied, this case presents a clean vehicle. This Court should grant this petition, so that Mr. Hughes and other similarly situated criminal defendants can have their eligibility for a sentence reduction properly determined under *Freeman*, and so that the application of *Marks* can be clarified more generally.

OPINIONS AND ORDERS BELOW

The decision of the Court of Appeals is reported at 849 F.3d 1008. Pet. App. 1a-15a. The district court's ruling on the sentence modification motion is unreported. Pet. App. 16a-30a.

JURISDICTION

The Court of Appeals entered judgment on February 27, 2017. Pet. App. 1a. On May 22, 2017, Justice Thomas extended the time for filing this petition for certiorari to and including July 27, 2017. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AND RULES INVOLVED

18 U.S.C. § 3582(c)(2) provides as follows:

> The court may not modify a term of imprisonment once it has been imposed except that ...

> in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. § 994(o), upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion, the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.

Federal Rule of Criminal Procedure 11(c)(1)(C) provides as follows:

> (c) Plea Agreement Procedure.
>
> (1) In General. An attorney for the government and the defendant's attorney, or the defendant when proceeding pro se, may discuss and reach a plea agreement. The court must not participate in these discussions. If the defendant pleads guilty or nolo contendere to either a charged offense or a lesser or related offense, the plea agreement may specify that an attorney for the government will:
>
> ...
>
> (C) agree that a specific sentence or sentencing range is the appropriate disposition of the case, or that a particular provision of the Sentencing Guidelines, or policy statement, or

sentencing factor does or does not apply (such a recommendation or request binds the court once the court accepts the plea agreement).

STATEMENT OF THE CASE

This Court Issues A 4-1-4 Decision In Freeman.

This case arises out of the interplay between a statutory provision about sentence reductions and a criminal procedure rule. The statute is 18 U.S.C. § 3582(c)(2), which provides that if the defendant's sentence is "based on" the Sentencing Guidelines, the defendant is eligible for a sentence reduction when the Sentencing Commission later retroactively lowers the Guidelines range applicable to the defendant's offense. The rule is Fed. R. Crim. P. 11(c)(1)(C), which provides that a defendant may enter into a plea agreement providing that a specific sentence is the appropriate disposition of his case. If the court accepts such a plea agreement, known as a "C-type agreement," the agreed-upon sentence binds the court. This Court tried—and failed—to authoritatively resolve the question whether, and under what circumstances, a plea agreement under Fed. R. Crim. P. 11(c)(1)(C) is eligible for a sentence reduction when the applicable sentencing range under the Sentencing Guidelines is subsequently lowered—i.e., when is the plea agreement "based on" the Sentencing Guidelines?

This Court ruled that the defendant in that case was eligible for a sentence reduction, but the Court did so in a divided 4-1-4 decision. *Freeman v. United States*, 564 U.S. 522 (2011). The four-Justice plurality explained that a district court generally has authority

to reconsider the sentence of a defendant who entered into a C-type plea agreement where later amendments to the Sentencing Guidelines reduce the applicable sentencing range for his crime of conviction, if the sentencing judge's decision to accept the plea agreement was based on the relevant Guidelines. *Freeman*, 564 U.S. at 534. The plurality's focus was on the judge's acceptance of the plea agreement.

Justice Sotomayor concurred in the judgment but "differ[ed] as to the reason why." *Id.* (Sotomayor, J., concurring). She held that the proper focus is on what the parties agreed to: In Justice Sotomayor's view, a court may reconsider a sentence in this context only if the plea agreement "expressly uses a Guidelines sentencing range applicable to the charged offense to establish the [agreed-upon] term of imprisonment, and that range is subsequently lowered by the United States Sentencing Commission." *Id.* Although Justice Sotomayor broke the tie in favor of the defendant, her reasoning was not endorsed by any other Justice. *See id.* at 544 (Roberts, C.J., dissenting) ("The plurality and the opinion concurring in the judgment agree on very little except the judgment.").

Mr. Hughes Enters Into A Plea Agreement Under Fed. R. Crim. P. 11(c)(1)(C) And Is Sentenced To 180 Months In Prison.

In 2013, a federal grand jury returned an indictment charging Erik Hughes with four counts of drug and firearm offenses. Pet. App. 3a; Pet. App. 16a-17a. After "negotiations between the parties and in exchange for the government dismissing otherwise provable counts against the Defendant," Mr. Hughes

entered into a plea agreement pursuant to Fed. R. Crim. P. 11(c)(1)(C). Pet. App. 54a. Under the agreement, Mr. Hughes pled guilty to Counts One and Three: conspiracy to possess with intent to distribute at least 500 grams of methamphetamine, and being a felon in possession of a firearm. Pet. App. 3a.

The plea agreement provided "that the Court should impose a sentence of 180 months of imprisonment as the appropriate custodial sentence in this case." Pet. App. 54a. During "plea discussions, it was discussed that [Mr. Hughes's Sentencing] Guideline range was 188-235 months." Pet. App. 74a. The plea agreement contains numerous references to the Guidelines. *See, e.g.*, Pet. App. 54a ("The Defendant understands that ... the Court will be required to consider ... the provisions of the United States Sentencing Guidelines ..."); Pet. App. 55a ("[T]he Court may still consider the conduct underlying such dismissed counts in determining relevant conduct under the Sentencing Guidelines ...."); *id.* ("Sentencing Guideline Recommendations"); Pet. App. 56a ("[T]he government also reserves the right to make recommendations regarding application of the Sentencing Guidelines."); *id.* ("[I]f ... additional evidence is sufficient to support a finding of a different application of the Guidelines ...."); Pet. App. 58a ("Pursuant to § 1B1.8 of the Sentencing Guidelines, the Government agrees that any self-incriminating information that was previously unknown to the Government ... will not be used in determining the applicable sentencing guideline range ....").

At the sentencing hearing, the district court determined Mr. Hughes's total offense level and his

criminal history category, and used those numbers to compute his recommended sentencing range under the Sentencing Guidelines—188 to 235 months. Pet. App. 36a. The court then explained that it "considered ... the sentencing guidelines," Pet. App. 32a-33a, and found that the agreed-upon sentence "complies ... with the[ir] spirit," Pet. App. 33a. The court accepted the plea agreement, and sentenced Mr. Hughes to 180 months in prison. Pet. App. 44a; *see* Fed. R. Crim. P. 11(c)(1)(C) (binding district court to recommended sentence if plea agreement is accepted).

The Sentencing Guidelines Are Amended To Lower The Applicable Sentencing Range, And The District Court Denies Mr. Hughes's Motion To Reduce His Sentence.

On July 18, 2014, the U.S. Sentencing Commission announced that Amendment 782 to the Sentencing Guidelines, which reduced the offense level for specified drug offenses by two levels, would go into effect on November 1, 2015, and would apply retroactively. Pet. App. 3a-4a; *see also* U.S. Sentencing Guidelines Manual § 1B1.10 (U.S. Sentencing Comm'n Nov. 2015). Under the amended guidelines, the recommended sentencing range for the offenses to which Mr. Hughes pled guilty would be 151 to 188 months. Pet. App. 4a; Pet. App. 75a.

After learning of the amendment to the Sentencing Guidelines, Mr. Hughes filed a motion to reduce his sentence pursuant to 18 U.S.C. § 3582(c)(2), which allows a court to reduce the term of imprisonment of "a defendant who has been sentenced ... based on a

sentencing range that has subsequently been lowered by the Sentencing Commission."[1] Pet. App. 71a-76a.

The district court denied Mr. Hughes's motion, Pet. App. 30a, holding that he was ineligible for a reduced sentence under Amendment 782 because the sentence in his binding plea agreement was not "based on" a sentencing guidelines range as required by § 3582(c)(2), Pet. App. 17a-18a. In so holding, the district court relied on Justice Sotomayor's concurring opinion in *Freeman*, which states that, in general, "the term of imprisonment imposed pursuant to a (C) agreement is, for purposes of § 3582(c)(2), 'based on' the agreement itself" rather than the Sentencing Guidelines. Pet. App. 21a (quoting 564 U.S. at 536). Under Justice Sotomayor's concurrence, where "a plea agreement ... provide[s] for a specific term of im-

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[1] According to the Sentencing Guidelines Manual, "the court shall not reduce the defendant's term of imprisonment ... to a term that is less than the minimum of the amended guideline range." U.S. Sentencing Guidelines Manual § 1B1.10(b)(2)(A). The only exception to this rule is when the defendant's sentence was initially reduced due to "substantial assistance to authorities." *Id.* at § 1B1.10(b)(2)(B). Here, Mr. Hughes requested that his sentence be reduced to 150 months (one month below the minimum of the amended guideline range), in accordance with a policy statement accompanying Amendment 782. Pet. App. 76a. Mr. Hughes argued that where a defendant has been sentenced to a term below the lower limit of the Sentencing Guidelines, "a reduction comparably less than the amended guidelines range ... may be appropriate." Pet. App. 75a (citing U.S. Sentencing Guidelines Manual § 1B1.10(b)(2)(B) (U.S. Sentencing Comm'n Nov. 2015)). But because Mr. Hughes did not qualify for the limited exception to the general rule, his sentence could be reduced to no less than 151 months.

prisonment," for the defendant to be eligible for a sentence reduction the agreement must "make clear that the basis for the specified term is a Guidelines sentencing range applicable to the offense to which the defendant pleaded guilty." *Id.* at 539. The district court held that, in this case, Mr. Hughes's "sentence was not linked or tied to the Sentencing Guidelines" because the plea agreement "does not mention an otherwise applicable Sentencing Guidelines range or Defendant's criminal history, and Defendant's criminal history category is not evident from the Agreement itself." Pet. App. 28a.

The Court Of Appeals Affirms, Expressly Noting The Existence Of A Deep And Entrenched Circuit Conflict.

The Court of Appeals affirmed, expressly noting the conflict among the circuits over which opinion in *Freeman* controls. Pet. App. 12a-15a. Rejecting the approach of the D.C. and Ninth Circuits, the court sided with "eight sister circuits," and held that "[a]s we see it, Justice Sotomayor's opinion provides a legal standard that produces results with which a majority of the Court in *Freeman* would agree because whenever Justice Sotomayor's opinion would permit a sentence reduction, the plurality opinion would as well." Pet. App. 9a, 12a-13a. As such, "Justice Sotomayor's opinion in *Freeman* provides the narrowest ground of agreement because her concurring opinion establishes the 'le[ast] far-reaching' rule." Pet. App. 8a.

In so holding, the court characterized as "misplaced" the contrary rulings of the D.C. and Ninth

Circuits that "Justice Sotomayor's concurring opinion does not provide the narrowest ground of agreement in *Freeman*" because it does not constitute a "'logical subset' of another, broader opinion." Pet. App. 9a-10a (citing *United States v. Davis*, 825 F.3d 1014, 1021-22 (9th Cir. 2016) (en banc); *United States v. Epps*, 707 F.3d 337, 350 (D.C. Cir. 2013)).

The Court of Appeals on this basis agreed with the district court that Mr. Hughes "is not eligible for a sentence reduction," because the plea agreement "does not make any recommendation about a specific application of the Sentencing Guidelines, [it] does not calculate [Mr.] Hughes's range or discuss factors that must be used to determine that range, such as [Mr.] Hughes's criminal history[, n]or does it set the agreed-upon sentence within the applicable guideline range." Pet. App. 14a-15a.

REASONS FOR GRANTING THE WRIT

I. One Circuit Split Over *Marks* Has Led To Another Circuit Split Over *Freeman*.

The courts of appeals are hopelessly divided over how to analyze fragmented decisions of this Court in light of the *Marks* "narrowest grounds" of agreement rule. *See, e.g.*, Ryan C. Williams, *Questioning* Marks*: Plurality Decisions and Precedential Constraint*, 69 STAN. L. REV. 795, 799 (2017) ("The conceptual confusion surrounding *Marks* presents an important practical challenge for lower courts."). Disagreement over *Marks* has, in turn, caused an irreconcilable division in the courts of appeals over the *Freeman* question.

All twelve regional circuits[2] have now interpreted *Freeman* in light of *Marks* to determine whether Justice Sotomayor's concurrence is controlling as the "narrowest grounds" of agreement. The Eleventh Circuit here joined nine sister circuits to hold that it is. The D.C. and Ninth Circuits, on the other hand, hold that there is no controlling opinion but apply the plurality opinion on the ground that it provides the most persuasive analysis. This Court should resolve the *Freeman* question to ensure that federal prisoners are not forced to endure overly long sentences based on the happenstance of where their crimes were committed and where they were prosecuted and sentenced. This Court should also clarify its holding in *Marks* more generally and provide guidance to lower courts struggling to interpret fragmented Supreme Court decisions.

A. The circuits are split over how to apply *Marks* to this Court's fragmented decisions.

In *Marks*, this Court held that, "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds ....'" 430 U.S. at 193 (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976) (opinion of Stewart, Powell, and Stevens, JJ)). In applying that rule to the case before it, the Court explained that the plurality opinion in

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[2] The Federal Circuit is the only court of appeals that has not reached the *Freeman* issue and, of course, it never will.

Memoirs v. Massachusetts, 383 U.S. 413 (1966), controlled the specific issue in *Marks* because the concurrences rested "on broader grounds in reversing the judgment below." *Marks*, 430 U.S at 193. The plurality opinion in *Memoirs* was therefore fully subsumed within the concurring analysis, and a majority of the Court agreed upon a rationale that led to the result.

But the *Marks* Court did not address what happens when the plurality and concurrence agree on the judgment but not on any aspect of the underlying rationale. In the years that have followed, the courts of appeals have taken sharply divergent approaches to this question.

The D.C. Circuit, for example, has explained that "*Marks* is workable ... only when one opinion is a logical subset of other, broader opinions." *King v. Palmer*, 950 F.2d 771, 781 (D.C. Cir. 1991) (en banc). When there is "no practical middle ground between" the plurality and the concurrence, *United States v. Epps*, 707 F.3d 337, 348-49 (D.C. Cir. 2013), no decision "can be meaningfully regarded as 'narrower,'" *King*, 950 F.2d at 781, and it is appropriate to "consider ... which, if any, of the rationales" in those opinions "is persuasive," *Epps*, 707 F.3d at 351.

The Ninth Circuit agrees. "A fractured Supreme Court decision should only bind the federal courts of appeal[s] when a majority of the Justices agree upon a single underlying rationale and one opinion can reasonably be described as a logical subset of the other." *Davis*, 825 F.3d at 1021-22. Accordingly, "[w]hen no single rationale commands a majority of the Court, only the specific result is binding on lower federal

courts." *Id.* at 1022. In the Ninth Circuit's view, the focus is on "whether the reasoning of a narrower opinion fit[s] entirely into the circle drawn by a broader opinion in order to derive a rule." *Id.* at 1021.

Other courts of appeals, however, including the Eleventh Circuit here, have adopted an approach focused on the results yielded by each opinion. These courts hold that the controlling opinion is the one that "will necessarily produce *results* with which a majority of the Court from that case would agree." Pet. App. 12a (internal quotation marks omitted) (emphasis in original). *See also, e.g., Planned Parenthood of Se. Pennsylvania v. Casey*, 947 F.2d 682, 694 (3d Cir. 1991) (finding Justice O'Connor's concurring opinions in *Webster v. Reproductive Health Services*, 492 U.S. 490, 530 (1989) and *Hodgson v. Minnesota*, 497 U.S. 417, 458-60 (1990), controlling because a majority of Justices would have agreed with the result under her concurrences), *aff'd in part, rev'd in part on other grounds*, 505 U.S. 833 (1992); *Tyler v. Bethlehem Steel Corp.*, 958 F.2d 1176, 1182 (2d Cir. 1992) ("In essence, what we must do is find common ground shared by five or more justices."); *United States v. Johnson*, 467 F.3d 56, 64 (1st Cir. 2006) (applying the results-oriented test where there are no identifiable "narrowest grounds" under the logical subset test).

Unless and until this Court clarifies *Marks*, the lower courts will be forced to continue to divine with no guidance which opinion is controlling whenever this Court issues a fragmented decision with a plurality and concurring opinions, a not uncommon occurrence that can implicate highly consequential cases. *Infra* § II.A. Indeed, "during the 54 terms from 1953

to 2006, th[is] Court issued 195 plurality opinions." James F. Spriggs, II & David R. Stras, *Explaining Plurality Decisions*, 99 GEO. L.J. 515, 519 (2011).

The divergence in the circuits' approaches has led to explicit disagreements over the holdings of specific decisions of this Court. For example, in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), the Court held that retroactive application of the Coal Industry Retiree Health Benefit Act of 1992 to Eastern Enterprises was unconstitutional. Justice O'Connor authored the plurality opinion, holding that the Act was unconstitutional under the Fifth Amendment's Takings Clause. *See id.* at 503-04 (plurality op.). Justice Kennedy concurred in the result—that the Act was unconstitutional—but rejected the plurality's rationale, instead relying on the Due Process Clause. *Id.* at 539 (Kennedy, J., concurring in the judgment and dissenting in part).

Because there is no clear majority rule, the courts of appeals are split as to what constitutes a taking under *Eastern Enterprises*. The Second and Sixth Circuits—like the D.C. and Ninth Circuits applying *Freeman*—find no controlling opinion in *Eastern Enterprises* because the concurrence is not a "logical subset" of the plurality opinion. *See United States v. Alcan Aluminum Corp.*, 315 F.3d 179, 189 (2d Cir. 2003); *Franklin Cty. Convention Facilities Auth. v. Am. Premier Underwriters, Inc.*, 240 F.3d 534, 552 (6th Cir. 2001). Therefore, "[t]he only binding aspect of such a splintered decision is its specific result, and so the authority of *Eastern Enterprises* is confined to its holding that the Coal Act is unconstitutional as applied to Eastern Enterprises." *Alcan*, 315 F.3d at 189.

In contrast, the First Circuit has determined that *Eastern Enterprises* has a much broader stare decisis effect. *Parella v. Ret. Bd. of the Rhode Island Emps.' Ret. Sys.*, 173 F.3d 46, 58 (1st Cir. 1999). According to the *Parella* court, *Eastern Enterprises* stands for the proposition that the Takings Clause applies only if the plaintiff identifies an established property right because that was the common ground for the "majority of [J]ustices"—Justice Kennedy and the four dissenting Justices. *Id.*

Rapanos v. United States, 547 U.S. 715 (2006) is similar. *Rapanos* is a 4-1-4 plurality decision addressing the scope of the EPA's authority to regulate wetlands. Justice Scalia's plurality opinion articulated a test under which federal regulatory jurisdiction would apply only to certain wetlands. *Id.* at 742. Justice Kennedy concurred in the judgment, but would apply a "significant nexus" test to determine federal regulatory jurisdiction. *Id.* at 779-83 (Kennedy, J., concurring in the judgment). Chief Justice Roberts' concurrence invited the EPA to engage in notice-and-comment rulemaking about the scope of federal power over wetlands, to which he would then give generous leeway. *Id.* at 757-58 (Roberts, C.J., concurring). Finally, Justice Stevens wrote a dissent, advocating that federal regulatory jurisdiction could be asserted either by applying the "significant nexus" test or by meeting the plurality's standard. *Id.* at 810 (Stevens, J., dissenting).

Not surprisingly, the circuits are split over how to apply *Rapanos*. *Compare Johnson*, 467 F.3d at 66 (First Circuit holding that the Government has jurisdiction if it satisfies the plurality or concurring test);

with United States v. Robison, 505 F.3d 1208, 1221-22 (11th Cir. 2007) (Eleventh Circuit accepting only the concurrence's test because it was the least "far-reaching" among the rationales that supported the judgment).

Freeman is yet another example of a 4-1-4 fragmented decision that has hopelessly divided the courts of appeals on how to apply *Marks*. *Infra* § I.B.

As these examples illustrate, this Court's review is urgently needed to address the courts of appeals' confusion over the meaning of *Marks*—which set forth a "test ... more easily stated than applied." *Nichols v. United States*, 511 U.S. 738, 745 (1994).

B. The 10-2 *Freeman* split sharply underscores the courts of appeals' disagreement over *Marks*.

Nowhere is the court of appeals' disagreement over *Marks* more evident than in their division over *Freeman*, where the circuits are split 10-2 over whether Justice Sotomayor's concurrence or the plurality's approach controls. As such, whether a prisoner is eligible for a reduced sentence in light of changes to the Sentencing Guidelines is determined in large part by the happenstance of geography. A ruling on the *Freeman* issue would not only provide much-needed clarity to criminal sentencing law but, more broadly, guidance on the correct approach to analyzing fragmented decisions of this Court.

The D.C. Circuit and the Ninth Circuit have applied the "logical subset" test to conclude that no single rationale in *Freeman* controls. *Davis*, 825 F.3d at 1021-22; *Epps*, 707 F.3d at 350-51. According to the D.C. Circuit, under *Marks* the "narrowest opinion must represent a common denominator of the Court's *reasoning*; it must embody a position implicitly approved by at least five Justices who support the judgment." *Epps*, 707 F.3d at 348 (citations omitted) (emphasis in original). But "there is no controlling opinion in *Freeman* because the plurality and concurring opinions do not share common reasoning whereby one analysis is a 'logical subset' of the other." *Id.* at 350 (citation omitted). The D.C. Circuit also elaborated that, under the *Freeman* concurrence, courts "examine the intent of the parties ... to determine whether a [C-type plea] sentence" is "'based on'" the Guidelines. *Id.* And, according to the *Freeman* plurality, this parties-focused approach "is fundamentally incorrect because § 3582(c)(2) 'calls for an inquiry into the reasons for a judge's sentence, not the reasons that motivated or informed the parties.'" *Id.* (quoting *Freeman*, 564 U.S. at 533 (plurality op.)). Against this backdrop, the D.C. Circuit reasoned that because "the set of cases where the defendant prevails under the concurrence is not always nestled within the set of cases where the defendant prevails under the plurality," Justice Sotomayor's opinion cannot control. *Id.* at 351.

The en banc Ninth Circuit has reached the same conclusion, explicitly rejecting the notion that Justice Sotomayor's concurrence was the lowest common denominator in *Freeman*, because "there are some circumstances where defendants would be eligible for

relief under Justice Sotomayor's approach but not under the plurality's." *Davis*, 825 F.3d at 1024. With no controlling opinion in *Freeman*, the Ninth Circuit was "restricted only by the ultimate result in *Freeman*: that defendants sentenced under Rule 11(c)(1)(C) agreements are not categorically barred from seeking a sentence reduction under § 3582(c)(2)." *Id.* at 1026.

These two circuits—the D.C. and Ninth Circuits—have thus found the *Freeman* plurality opinion more persuasive and on that basis have allowed district court reconsideration of defendants' sentences. *Id.*; *Epps*, 707 F.3d at 351-53.

In contrast, ten other circuits, including the Eleventh Circuit in this case, have concluded that Justice Sotomayor's concurring opinion in *Freeman* controls because it reflects the narrowest *result*. *See* Pet. App. 10a-13a; *United States v. Rivera-Martínez*, 665 F.3d 344, 348 (1st Cir. 2011); *United States v. Howell*, 541 F. App'x 13, 14 (2d Cir. 2013); *United States v. Thompson*, 682 F.3d 285, 290 (3d Cir. 2012); *United States v. Brown*, 653 F.3d 337, 340 n.1 (4th Cir. 2011); *United States v. Benitez*, 822 F.3d 807, 811 (5th Cir. 2016); *United States v. Smith*, 658 F.3d 608, 611 (6th Cir. 2011); *United States v. Dixon*, 687 F.3d 356, 359 (7th Cir. 2012); *United States v. Browne*, 698 F.3d 1042, 1045 (8th Cir. 2012); *United States v. Graham*, 704 F.3d 1275, 1277-78 (10th Cir. 2013).

These courts hold that Justice Sotomayor's opinion reflects the "narrowest grounds" under *Marks* because, in their view, every Justice in the *Freeman* plurality would agree that the defendant is eligible for a sentence reduction when a C-type plea agreement

expressly uses a Guidelines sentencing range to establish the length of the sentence imposed. *See, e.g.*, *Brown*, 653 F.3d at 340 n.1.

In light of the above-cited case law, there is no need at this point for additional percolation in the lower courts. The regional courts of appeals have all addressed the *Freeman* question and they are sharply and irrevocably divided. At this point, "further consideration of the substantive and procedural ramifications of the problem by other courts will [not] enable [this Court] to deal with the issue more wisely at a later date." *McCray v. New York*, 461 U.S. 961, 962 (1983) (Stevens, J., opinion respecting denial of certiorari).

II. The Questions Presented Are Important And Recurring.

A. The questions presented are important.

As explained above, *supra* § I.A, the *Marks* question arises not just in the context of *Freeman* sentencing cases, but also potentially in every area of law where this Court may issue a fragmented decision. Some of this Court's most significant cases—involving

such issues as abortion,[3] gun control,[4] voting rights,[5] affirmative action,[6] capital punishment,[7] and the scope of congressional authority under the Commerce Clause[8]—have been decided by a plurality decision. The proper interpretation of a plurality decision may also implicate any number of other issues in areas such as criminal procedure,[9] personal jurisdiction,[10]

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[3] *Planned Parenthood*, 505 U.S. 833 (Pennsylvania informed consent law); *Webster*, 492 U.S. 490 (Missouri abortion restrictions).

[4] *McDonald v. City of Chicago*, 561 U.S. 742 (2010) (incorporation of Second Amendment against state governments).

[5] *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181 (2008) (Indiana voter identification law).

[6] *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (racial preferences in public contracting); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (racial preferences in higher education).

[7] *Baze v. Rees*, 553 U.S. 35 (2008) (permissible methods of capital punishment); *Gregg*, 428 U.S. 153 (capital punishment's constitutionality).

[8] *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012) (Congress's authority to require individuals to acquire health insurance).

[9] *Williams v. Illinois*, 567 U.S. 50 (2012) (whether statements prepared in the course of an investigation were "testimonial" for purposes of the Sixth Amendment's Confrontation Clause).

[10] *J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 873 (2011) (whether a defendant may be subject to the jurisdiction of the courts of the United States but not of any particular State).

class certification,[11] and federal preemption of state law.[12] *See* Williams, 69 STAN. L. REV. at 800-01.

Resolving the holding in *Freeman* would control the outcome of this case, but resolving the broader question would also assist the lower courts in grappling with *Marks* in other important settings. The Court should clarify the *Marks* rule, for the benefit of Mr. Hughes and similarly situated criminal defendants, and also for the benefit of other parties litigating a diverse range of issues under fragmented Supreme Court authority.

Regarding the specific context of this case—where Justice Sotomayor's *Freeman* concurrence affects a large number of inmates both now and into the future—retroactive Sentencing Guidelines amendments are not uncommon. *See* U.S.S.G. § 1B1.10(d) (listing 29 retroactive amendments to date).[13] For example, the amendment analyzed in *Freeman* was different than the one at issue here. *See* 564 U.S. at 528 (plurality op.) (discussing amendment

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[11] *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 559 U.S. 393 (2010) (whether a state legislature can prohibit federal courts from using a federal class action rule for a state law claim).

[12] *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996) (whether the Medical Device Amendments of 1976 preempt state common-law negligence action).

[13] *See* U.S.S.G. § 1B1.10(d) ("Amendments covered by this policy statement are listed in Appendix C as follows: 126, 130, 156, 176, 269, 329, 341, 371, 379, 380, 433, 454, 461, 484, 488, 490, 499, 505, 506, 516, 591, 599, 606, 657, 702, 706 as amended by 711, 715, 750 (parts A and C only), and 782 (subject to subsection (e)(1)).").

706, which remedied disparities between penalties for cocaine base and powder cocaine offenses). Not only has the Sentencing Commission freely amended the Guidelines in the past, but it continues to do so, and the Commission not infrequently gives its amendments retroactive effect. *See, e.g.*, U.S. Sentencing Comm'n, Proposed Amendments to the Sentencing Guidelines at ii (Dec. 19, 2016) (requesting "public comment" regarding whether "any proposed amendment published in this document should ... be applied retroactively to previously sentenced defendants").

Incarcerated prisoners routinely file motions seeking a reduction in sentence because the Sentencing Guidelines were amended. According to an October 2016 Sentencing Commission report, 567 motions for sentence reductions based on Amendment 782 alone were denied in light of a "binding plea" in a period of just 700 days (Nov. 1, 2014 to Sept. 30, 2016). *U.S. Sentencing Comm'n, 2014 Drug Guidelines Amendment Retroactivity Data Report* Table 1 (Oct. 2016), *available at* http://tinyurl.com/USSC2014 (last visited July 23, 2017). The issue is ubiquitous, and will continue to arise as long as defendants sign C-type plea agreements and the Commission regularly amends the Sentencing Guidelines with retroactive effect.

Finally, there can be no doubt about the importance of the underlying merits question that *Freeman* failed to resolve authoritatively. This Court has already granted certiorari on that question. And it is no less important now than it was then. While the Court may well reach the same impasse as it did before, it is also possible that with the passage of time

and the further experience of 12 circuits, this Court could reach a resolution that was once elusive. That has certainly happened before. *See, e.g.*, *Grutter v. Bollinger*, 539 U.S. 306, 325 (2003); *Nichols*, 511 U.S. 738; *Bakke*, 438 U.S. 265. So we thought it prudent to give this Court the option of trying again. Should this Court grant the third question presented, it should be no surprise that our merits brief will press the position of the four-Justice plurality in *Freeman*: that "[w]here the decision to impose a sentence is based on a range later subject to retroactive amendment, § 3582(c)(2) permits a sentence reduction" and there is "no support in § 3582(c)(2), Rule 11(c)(1)(C), or the relevant Guidelines policy statements" for the "categorical bar enacted by the Court of Appeals" there with respect to C-type plea agreements. 564 U.S. at 525-26.

B. The questions presented are recurring.

To date, *Marks* has led this Court, on at least three occasions, to address an issue twice because lower courts inconsistently applied the Court's original, fractured decision. In *City of Burlington v. Dague*, 505 U.S. 557, 559 (1992), for example, the Court examined a "question [] essentially identical to the one [the Court] addressed" previously in *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711 (1987). In *Nichols*, this Court recognized that confusion arising from the fragmented decision in *Baldasar v. Illinois*, 446 U.S. 222 (1980) was, again, requiring it to "reexamin[e] that decision." *Nichols*, 511 U.S. at 746. And in *Grutter*, 539 U.S. at 325, this Court recognized that the courts of appeals were split over the question of

which opinion, if any, controlled with respect to the divided decision in *Bakke*, 438 U.S. 265, thereby compelling the Court to take up the issue again and revisit the question presented. And because of the frequency of plurality decisions issued by the Court, lower courts will continue to face *Marks*-related questions until this Court clarifies its meaning. Spriggs, 99 GEO. L. J. at 519; *id.* at 517-18 nn. 3-12.

The specific question of articulating the proper holding of *Freeman* has been the subject of recent certiorari petitions that this Court has denied.[14] In opposing those petitions, the government has suggested that the issue is not cert-worthy because it is "short-lived." *See, e.g.*, Brief in Opposition, *McNeese v. United States*, No. 16-66, 2016 WL 6082343, at *18 (U.S. Oct. 14, 2016). But one must look no further than the entrenched 10-2 circuit split to grasp the far-reaching and recurring nature of this issue. Although *Freeman* was decided only six years ago, every regional circuit has spoken to the question of what its holding is, most more than once. *See supra* § I.B.2; *see also, e.g.*, *United States v. Duvall*, 705 F.3d 479, 483 (D.C. Cir. 2013); *United States v. Austin*, 676 F.3d 924, 927 (9th Cir. 2012) *overruled by Davis*, 825 F.3d 1014; *United States v. Mitchell*, 500 F. App'x 802, 805

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[14] *See Negrón v. United States*, No. 16-999, 2017 WL 636003 (U.S. June 26, 2017); *Gilmore v. United States*, No. 16-7953, 2017 WL 661819 (U.S. June 19, 2017); *Sullivan v. United States*, No. 16-7182, 2017 WL 2621326 (U.S. June 19, 2017); *Blaine v. United States*, 137 S. Ct. 1329 (2017); *Fuentes v. United States*, 137 S. Ct. 627 (2017); *Chapman v. United States*, 137 S. Ct. 625 (2017); *McNeese v. United States*, 137 S. Ct. 474 (2016).

(11th Cir. 2012) (per curiam). This issue is not going away.

If this Court does not intervene, the current confusion regarding *Freeman*'s holding will continue to persist. This kind of discord is in direct conflict with the main purpose of the Sentencing Guidelines, which is to "reduce unwarranted disparities in federal sentencing." *Freeman*, 564 U.S. at 525; *Dorsey v. United States*, 567 U.S. 260, 264 (2012) ("uniformity" is a "basic Federal Sentencing Guidelines objective"). In fact, the circuit split here "permit[s] the very disparities the Sentencing Reform Act seeks to eliminate." *Freeman*, 564 U.S. at 533. Without this Court's intervention, appellate review will serve only to solidify sentencing differences, not "promote uniformity by tending to iron out sentencing differences." *Peugh v. United States*, 133 S. Ct. 2072, 2083 (2013) (internal quotations omitted). Moreover, as we have noted, clarifying the correct approach to analyzing *Freeman* would resolve not only an important area of sentencing law, but would also help to clarify more generally how to apply *Marks*' "narrowest grounds" rule, which has "baffled and divided the lower courts ...." *Nichols*, 511 U.S. at 746.

In opposing certiorari, the government has also argued that "because plea agreements can ... be drafted to avoid any controversies about whether the sentence set forth in such an agreement is 'based upon' the Guidelines," which "*Freeman* opinion[] controls" is not an issue that needs to be resolved. *See, e.g.*, Brief in Opposition, *McNeese*, 2016 WL 6082343, at *18. But that assertion is counter-factual. The government's plea agreements in the Northern District of

Georgia are not materially different today than they were when *Freeman* was decided over six years ago. The agreement in this case was drafted post-*Freeman* and included no such language. Moreover, cases will continue to arise where the defendant signed a C-type agreement and was sentenced pre-*Freeman*, but the controlling Guidelines range is later reduced.

As a practical matter, it is also not clear how, or if, the government's suggested drafting process would work, much less how it would operate on a uniform, nationwide basis. Notably, the government has only said that it "can" draft such plea agreements, *id.*, not that it actually does so or that it intends to do so. It cannot say that this process will work, because it has no control. A plea agreement, like any other sort of agreement, requires collaboration on both sides. The defendant would thus have to agree to waive any eligibility for a sentence reduction in the event of future amendments to the Sentencing Guidelines. It is unclear why the government expects that defendants would generally agree to such a waiver. For all of these reasons, there is no reason to anticipate that the government can somehow avoid the need for this Court's resolution of the issue through an altered approach to the drafting of Rule 11(c)(1)(C) plea agreements.

III. This Case Is An Ideal Vehicle For Answering The Questions Presented And Resolving The Underlying Circuit Conflicts.

This case presents the perfect opportunity for this Court to clarify *Marks* and determine whether Justice Sotomayor's concurrence in *Freeman* controls.

As the government has explained in opposing certiorari, the recent petitions that this Court has denied have featured substantial vehicle issues. Most notably, the prior cases have generally (1) waived any challenge to Justice Sotomayor's concurrence as the controlling opinion in *Freeman*;[15] and/or (2) presented circumstances where the petitioner's sentence was already below the amended sentencing range, was based on a range that was not in fact amended, or was otherwise not eligible for a reduced sentence under either Justice Sotomayor's or the plurality's approach in *Freeman*, thus making any decision by this Court immaterial to the outcome.[16]

This case stands in stark contrast. Here, Mr. Hughes has not waived his *Freeman* challenge, and

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[15] *See* Brief in Opposition, *Negrón v. United States*, No. 16-999, at **11-13 (U.S. May 19, 2017), *cert. denied*, 2017 WL 636003 (U.S. June 26, 2017); Brief in Opposition, *Gilmore v. United States*, No. 16-7953, at *12-13 (U.S. May 19, 2017), *cert. denied*, 2017 WL 661819 (U.S. June 19, 2017); Brief in Opposition, *Blaine v. United States*, No. 16-6574, at *15 (U.S. Feb. 6, 2017), *cert. denied*, 137 S. Ct. 1329 (2017); Brief in Opposition, *Fuentes v. United States*, No. 16-6132, at **10-12 (U.S. Nov. 23, 2016), *cert. denied*, 137 S. Ct. 627 (2017); Brief in Opposition, *Chapman v. United States*, No. 16-5969, at **12-14 (U.S. Nov. 16, 2016), *cert. denied*, 137 S. Ct. 625 (2017).

[16] *See* Brief in Opposition, *Gilmore v. United States*, No. 16-7953, at **22-23 (U.S. May 19, 2017) *cert. denied*, 2017 WL 661819 (U.S. June 19, 2017); Brief in Opposition, *Sullivan v. United States*, No. 16-7182, at *15 (U.S. May 15, 2017), *cert. denied*, 2017 WL 2621326 (U.S. June 19, 2017); Brief in Opposition, *Blaine v. United States*, No. 16-6574, at **23-24 (U.S. Feb. 6, 2017), *cert. denied*, 137 S. Ct. 1329 (2017); Brief in Opposition, *McNeese v. United States*, No. 16-66, 2016 WL 6082343, at *12 (U.S. Oct. 14, 2016), *cert. denied*, 137 S. Ct. 474 (2016).

his sentence could be lowered within the amended range.

1. In his briefing below, Mr. Hughes expressly challenged the district court's reliance on Justice Sotomayor's concurrence. *See, e.g.*, Initial Brief of Appellant, *United States v. Hughes*, No. 15-15246-C, 2016 WL 1376175, at **10-12 (11th Cir. Mar. 14, 2016). The Eleventh Circuit plainly did not consider the issue waived; to the contrary, its opinion is based entirely on the *Freeman* split. Pet. App. 4a-5a, 9a-10a.

Further, this case squarely raises the question of how to apply *Marks* to determine the Court's holding, both under *Freeman* specifically and more generally under other fragmented Supreme Court decisions. If the D.C. and Ninth Circuits are correct that an opinion must be a "logical subset" of another in order to be considered controlling under *Marks*, then neither the plurality nor the concurrence in *Freeman* is controlling, as neither is a logical subset of the other (*see infra* § IV), and the Eleventh Circuit's analysis was incorrect. If, however, it is enough to share in the "result," then the Eleventh Circuit properly relied on Justice Sotomayor's concurrence as controlling because it was the narrowest opinion supporting the majority result. Thus, identifying the controlling opinion in *Freeman* is not an abstract issue in this case; the outcome of the case turns on it.

2. Likewise, if Mr. Hughes were determined to be eligible for a sentence reduction under § 3582, he is not otherwise categorically barred from relief. Because his current sentence (180 months) is not already below the amended Sentencing Guidelines

range (151 to 188 months), there is room for a reduction. And because his sentence is actually below the lower limit of the original Guidelines range (188 to 235 months), a comparable sentence under the amended Guidelines would suggest that his amended sentence should be at the lower end of the amended range. *See, e.g.*, U.S. Sentencing Guidelines Manual, Commentary § 1B1.10 cmt. note 3 (U.S. Sentencing Comm'n Nov. 2015) (calculating "comparable adjustments"); *id.* ("If the term of imprisonment imposed was outside the guideline range applicable to the defendant ... the court ... *may* reduce the defendant's term of imprisonment, but shall not reduce it to a term less than" the lower threshold of the amended Guideline range) (emphasis added).

Accordingly, if a reduction were permitted, the district court could reduce Mr. Hughes's sentence to a term of imprisonment as low as 151 months. *Compare McNeese*, 137 S. Ct. 474 (where his sentence was already "less than the minimum of the amended guideline range," defendant was ineligible for a sentence reduction). *See generally* Brief in Opposition, *McNeese*, 2016 WL 6082343, at *11; U.S.S.G. § 1B1.10(b)(2)(A) (providing that a district court "shall not reduce the defendant's term of imprisonment under 18 U.S.C. § 3582(c)(2) to a term that is less than the minimum of the amended guideline range").

This Court has denied several recent certiorari petitions about how to treat C-type agreements. But none of them separately raised the *Marks* question or presented such a clean vehicle. As noted above, the petitioner had plainly waived his *Freeman* challenge

in several of the petitions. *Supra* 26, n.15. And in others, the Court's intervention would have resulted in no relief for the Petitioner. *Supra* 26, n. 16. *See, e.g.*, Brief in Opposition, *Gilmore v. United States*, No. 16-7953, at *23 (U.S. May 19, 2017) (explaining that defendant was ineligible for a sentence reduction because the amended range is "well above the 168-month sentence that petitioner already received"); Brief in Opposition, *Sullivan v. United States*, No. 16-7182, at *15 (U.S. May 15, 2017) (explaining that defendant was ineligible for sentence reduction because the amended range, "at the low end, is 31 months longer than the 204-month term of imprisonment that the district court already imposed").

3. Mr. Hughes also satisfies all six factors that the government has characterized as unique to the "subset" of cases impacted by the *Freeman* circuit split: (1) the district court accepted an agreement that contained a binding sentence, Pet. App. 44a; (2) the agreement did not specifically mention the Guidelines as a basis for the sentence but the district court nonetheless expressly relied on the Guidelines as part of its analytical framework, Pet. App. 32a-33a; (3) the Sentencing Commission subsequently lowered the relevant sentencing range retroactively while Mr. Hughes was still serving his sentence, Pet. App. 3a-4a; *see also* U.S. Sentencing Guidelines Manual § 1B1.10 (U.S. Sentencing Comm'n Nov. 2015); (4) Mr. Hughes made a motion for § 3582(c) relief, Pet. App. 71a-76a; (5) the Commission's binding policy statements do not bar Mr. Hughes from obtaining the relief sought, U.S. Sentencing Guidelines Manual § 1B1.10 (U.S. Sentencing Comm'n Nov. 2015); and (6) there is

no reason to believe the district court would not exercise its discretion to permit relief (taking into account applicable factors set forth in 18 U.S.C. § 3553(a) and the advantages already gained by Mr. Hughes's connection with the agreement, such as dismissal of other charges). *See, e.g.*, Brief in Opposition, *McNeese*, 2016 WL 6082343, at *18. Mr. Hughes also expressly raises the *Marks* question, not just the specific *Freeman* question.

In sum, the *Marks* and *Freeman* issues are well-developed, the splits are clear and deep, and the vehicle is clean. Granting the petition would not only give this Court a much-needed opportunity to address *Marks* by clarifying *Freeman*, but it would also significantly impact Mr. Hughes and many other incarcerated prisoners who are currently ineligible for a sentence reduction in circuits where Justice Sotomayor's separate concurrence wrongly controls.

IV. The Eleventh Circuit Decision Is Wrong And Should Be Reversed.

The Eleventh Circuit's ruling is wrong because it rejects the "logical subset" test—the only workable application of *Marks*, under which an opinion from a fragmented decision controls only to the extent that it reflects the "narrowest grounds" for the judgment. 430 U.S. at 193. Here, as the Ninth Circuit has explained, "Justice Sotomayor focused on the role the *parties'* Guidelines calculations play .... By contrast, the plurality focuses on the role of the *judge's* Guidelines calculations in deciding whether to accept or reject the agreement." *Davis*, 825 F.3d at 1022 (emphasis in original). The plurality and concurring

opinions thus lack a common rationale. The concurrence is not narrower—just different.

Under the "logical subset" test—properly applied by the D.C. and Ninth Circuits—an opinion cannot be the "narrowest grounds" for the Court's decision if there is a factual scenario in which one opinion would grant relief but the other would not, and vice versa. The government's opposition to the D.C. and Ninth Circuits' application of *Marks* to *Freeman* has posited that "no scenario exists under which a defendant could prevail under Justice Sotomayor's approach but the plurality would disagree." *See, e.g.*, Brief in Opposition, *McNeese*, 2016 WL 6082343, at **16-17. But that is incorrect. "Cases producing an outcome in favor of the defendant under Justice Sotomayor's opinion would *not* invariably yield an outcome in his favor under the plurality." *United States v. Duvall*, 740 F.3d 604, 619 (D.C. Cir. 2013) (Williams, J., concurring in denial of rehearing en banc) (emphasis in original).

Imagine a scenario where the parties expressly include the text of a particular Sentencing Guideline in the pertinent provision of the plea agreement, but the district court disagrees with the parties' assessment regarding the applicable sentencing range. *Davis*, 825 F.3d at 1023. If the court nonetheless accepts the plea agreement, the defendant would be eligible for a later sentence reduction under Justice Sotomayor's concurrence because the parties expressly included language from the Guidelines in the relevant terms of the agreement. But the defendant would not be eligible for a reduction under the plurality's approach, because the court disagreed with the articulated Guidelines range and thus based the sentence

on other considerations. *Id.* Indeed, the *Freeman* plurality notes that it is only "likely," not guaranteed, that a sentencing court would base its decision on the Guidelines. 564 U.S. at 534. And there are certainly factual scenarios where a defendant would be eligible for a sentence reduction under the plurality opinion but not the concurrence. Because both scenarios exist, neither Justice Sotomayor's concurrence nor the plurality's opinion can be said to be "narrow[er]" than the other. *Davis*, 825 F.3d at 1023-24.

The "results" test that the Eleventh Circuit and other circuits have employed should be rejected. It cannot be that an opinion rejected by every Justice except its author is nonetheless binding precedent. *See Freeman*, 564 U.S. at 532-33 (plurality op.) (rejecting Justice Sotomayor's reliance on the terms of the plea agreement because the "statute ... calls for an inquiry into the reasons for a judge's sentence, not the reasons that motivated or informed the parties."); *id.* at 544 (Roberts, C.J., dissenting) ("I agree with the plurality that the approach of the concurrence to determining when a Rule 11(c)(1)(C) sentence may be reduced is arbitrary and unworkable."). The Eleventh Circuit, by giving binding effect to Justice Sotomayor's separate concurrence, has "turn[ed] a single opinion that lacks majority support into national law." *King*, 950 F.2d at 782; *see id.* ("When eight of nine Justices do not subscribe to a given approach to a legal question, it surely cannot be proper to endow that approach with controlling force ...."). Eugene Wambaugh, *The Study of Cases* § 48, at 50 & n.1 (2d ed. 1894) ("If ... less than a majority concur in a rule, no one will claim that it has the force of the authority of the court.").

Neither Justice Sotomayor's concurrence nor the plurality's opinion ultimately controls in *Freeman* beyond the basic rule that § 3582(c)(2) relief is available to at least some defendants who have signed plea agreements under Fed. R. Crim. P. 11(c)(1)(C). The Eleventh Circuit erred in holding that it was bound by Justice Sotomayor's concurrence.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 15-15246

D.C. Docket No. 4:13-cr-00043-HLM-WEJ-1

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ERIK LINDSEY HUGHES,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Georgia

(February 27, 2017)

Before WILLIAM PRYOR, JORDAN, and BALDOCK,* Circuit Judges.

WILLIAM PRYOR, Circuit Judge:

This appeal requires us to apply the rule of *Marks. v. United States*, 430 U.S. 188 (1977), to the splintered opinion in *Freeman v. United States*, 564 U.S. 522 (2011), to determine whether a defendant who entered into a plea agreement that recommended a particular sentence as a condition of his guilty plea is eligible for a reduced sentence, 18 U.S.C. § 3582(c)(2). Erik Hughes pleaded guilty to drug and firearm offenses and entered into a binding plea agreement with the government, Fed. R. Crim. P. 11(c)(1)(C). The district court accepted the agreement and sentenced Hughes according to the agreement. Hughes then sought a sentence reduction permitted for defendants who have been "sentenced to a term of imprisonment *based on a sentencing range* that has subsequently been lowered by the Sentencing Commission." 18 U.S.C. § 3582(c)(2) (emphasis added). In *Freeman*, the justices divided over the question whether a defendant sentenced under a binding plea agreement was sentenced "based on a sentencing range." 564 U.S. at 525, 534. The district court determined that Justice Sotomayor's concurring opinion stated the holding in *Freeman* because she concurred in the judgment on the narrowest grounds, *Marks*, 430 U.S. at 193, and it denied Hughes's motion based on the reasoning of

* Honorable Bobby R. Baldock, United States Circuit Judge for the Tenth Circuit, sitting by designation.

that concurring opinion. We agree on both counts. Hughes is ineligible for a sentence reduction because he was not sentenced "based on a sentencing range," 18 U.S.C. § 3582(c)(2), that has since been lowered. We affirm.

I. BACKGROUND

In 2013, a federal grand jury returned an indictment that charged Erik Hughes in four counts for drug and firearm offenses. Hughes pleaded guilty to two counts: conspiracy to possess with intent to distribute at least 500 grams of methamphetamine, 21 U.S.C. §§ 841(b)(1)(A)(viii), 846, and being a felon in possession of a firearm, 18 U.S.C. § 922(g)(1). In the plea agreement, Hughes and the government agreed to a sentence of 180 months of imprisonment.

At the sentencing hearing, the district court calculated Hughes's guidelines range and determined that his sentencing range under the United States Sentencing Guidelines was 188 to 235 months. The district court then accepted the plea agreement, which bound the court to impose the below-guidelines sentence recommended by the parties. *See* Fed. R. Crim. P. 11(c)(1)(C). So the district court sentenced Hughes to 180 months of imprisonment.

Just over a year later, Hughes filed a motion to reduce his sentence, 18 U.S.C. § 3582(c)(2). Section 3582(c)(2) allows a court to reduce the term of imprisonment of "a defendant who has been sentenced ... based on a sentencing range that has subsequently been lowered by the Sentencing Commission." Hughes sought a reduction based on

Amendment 782 to the Sentencing Guidelines, which reduced the offense levels for certain drug offenses by two levels and applies retroactively. *See* United States Sentencing Guidelines Manual § 1B1.10 (Nov. 2015). According to Hughes, applying the amendment would reduce his guidelines range to 151 to 188 months.

The district court denied Hughes's motion. It determined that Hughes was ineligible for a reduced sentence. It reasoned, based on Justice Sotomayor's concurring opinion in *Freeman*, that the sentence in Hughes's binding plea agreement was not "based on" a sentencing guidelines range as required by section 3582(c)(2).

II. STANDARDS OF REVIEW

"We review a district court's decision whether to reduce a sentence pursuant to [section] 3582(c)(2), based on a subsequent change in the sentencing guidelines, for abuse of discretion." *United States v. Brown*, 332 F.3d 1341, 1343 (11th Cir. 2003). Like all questions of statutory interpretation, we review the conclusions of the district court about the scope of its legal authority under section 3582(c)(2) *de novo*. *United States v. Moore*, 541 F.3d 1323, 1326 (11th Cir. 2008).

III. DISCUSSION

We divide our discussion in two parts. First, we explain that Justice Sotomayor's concurring opinion in *Freeman* constitutes the holding of that decision because it is the "position taken by th[e] [Justice] who

concurred in the judgment[] on the narrowest grounds." *Marks*, 430 U.S. at 193 (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976) (opinion of Stewart, Powell, and Stevens, JJ.)). Second, we explain that the district court correctly denied Hughes's motion for a sentence reduction because applying the holding of *Freeman*, Hughes was not sentenced based on a sentencing guidelines range, *Freeman*, 564 U.S. at 538-39 (Sotomayor, J., concurring in the judgment).

A. Justice Sotomayor's Concurring Opinion Stated the Holding in Freeman.

Federal courts ordinarily may not "modify a term of imprisonment once it has been imposed," 18 U.S.C. § 3582(c), but "Congress has provided an exception to that rule 'in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission.'" *Dillon v. United States*, 560 U.S. 817,819 (2010) (quoting 18 U.S.C. § 3582(c)(2)). Such a defendant may have his sentence reduced after the court "consider[s] the factors set forth in [18 U.S.C.] § 3553(a) ... if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission." *Id.* § 3582(c)(2).

In *Freeman*, the Supreme Court split over the question whether defendants like Hughes who enter into plea agreements that recommend a particular sentence as a condition of their guilty plea were sentenced "based on a sentencing range." 564 U.S. at 525 (plurality opinion). William Freeman entered into

a plea agreement with the government under Rule 11(c)(1)(C), and the district court accepted the agreement and imposed the recommended sentence. *Id.* at 527-28. The Sentencing Commission later issued a retroactive amendment that lowered the guidelines range applicable to Freeman's conduct, and he moved for a sentence reduction, 18 U.S.C. § 3582(c)(2). *Id.* at 528. The district court denied Freeman's motion, and the Sixth Circuit affirmed. *Id.* But the Supreme Court, in a five to four decision, reversed. *Id.* at 525-526

Five justices agreed that the district court could reduce Freeman's sentence, but those justices differed in their reasoning. The plurality opinion, joined by four justices, determined that the "[t]he district judge's decision to impose a sentence may ... be based on the Guidelines even if the defendant agrees to plead guilty under Rule 11(c)(1)(C)." *Id.* at 526. "In every case the judge must exercise discretion to impose an appropriate sentence" and "[t]his discretion, in turn, is framed by the Guidelines." *Id.* at 525. But Justice Sotomayor concurred only in the judgment. *Id.* at 534.

Justice Sotomayor's concurring opinion determined that "the term of imprisonment imposed by a district court pursuant to an agreement authorized by Federal Rule of Criminal Procedure 1(c)(1)(C) ... is 'based on' the agreement itself, not on the judge's calculation of the Sentencing Guidelines." *Id.* (Sotomayor, J., concurring in the judgment). Under this view, if a plea agreement "call[s] for the defendant to be sentenced within a particular Guidelines sentencing range," the acceptance of the

agreement by the district court "obligates the court to sentence the defendant accordingly, and there can be no doubt that the term of imprisonment the court imposes is 'based on' the agreed-upon sentencing range." *Id.* at 538. And if a plea agreement "provide[s] for a specific term of imprisonment ... but also make[s] clear that the basis for the specified term is a Guidelines sentencing range applicable to the offense to which the defendant pleaded guilty," then "[a]s long as that sentencing range is evident from the agreement itself," the term of imprisonment imposed is "based on" that range. *Id.* at 539.

"When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'" *Marks*, 430 U.S. at 193 (quoting *Gregg*, 428 U.S. at 169 n.15). "The *Marks* Court did not elaborate on how to identify the narrowest grounds." Bryan A. Garner, *et al.*, *The Law of Judicial Precedent* 199-200 (2016). "But the prevailing view is that the narrowest grounds are those that, when applied to other cases, would consistently produce results that a majority of the Justices supporting the result in the governing precedent would have reached." *Id.* at 200. We have explained that the "'narrowest grounds' is understood as the 'less far-reaching' common ground." *United States v. Robison*, 505 F.3d 1208, 1221 (11th Cir. 2007) (quoting *Johnson v. Bd. of Regents*, 263 F.3d 1234, 1247 (11th Cir. 2001)). When determining which opinion controls, we do not "consider the positions of those who dissented." *Id.*

Justice Sotomayor's opinion in *Freeman* provides the narrowest ground of agreement because her concurring opinion establishes the "le[ast] far-reaching" rule. District courts are required to consult the guidelines before sentencing a defendant, *see Freeman*, 564 U.S. at 525-26 (plurality opinion), and district courts may not accept an agreement under Rule 11(c)(1)(C) "without first evaluating the recommended sentence in [the] light of the defendant's applicable sentencing range." *Id.* at 529; *see also* U.S.S.G. § 6B1.2. Under the logic of the plurality opinion, the guidelines range always "provide[s] a framework or starting point—a basis, in the commonsense meaning of the term—for the judge's exercise of discretion" in deciding to accept a plea agreement under Rule 11(c)(1)(C). *Id.* Justice Sotomayor's opinion, by contrast, provides two examples in which a sentence is based on a sentencing range.

Both opinions agree on the broader principle that defendants sentenced based on a binding plea agreement can later have their sentences reduced under section 3582(c)(2), but the concurring opinion uses narrower reasoning than the plurality opinion. Whenever the concurring opinion would grant relief to a defendant sentenced according to a binding plea agreement, the plurality opinion would agree with the result because, under the logic of the plurality opinion, a defendant should always receive relief. Justice Sotomayor's opinion is the less far-reaching common ground. We already reached this conclusion *in dicta* when we evaluated the impact of *Freeman* on our precedent and stated that "Justice Sotomayor's concurring opinion can be viewed as the holding in

Freeman." *United States v. Lawson*, 686 F.3d 1317, 1321 n.2 (11th Cir. 2012).

The decisions of eight sister circuits also support our conclusion that Justice Sotomayor's concurring opinion is the holding of *Freeman*. *See Garner, et al., supra*, at 204 ("Almost every federal circuit court to consider the *Marks* issue in *Freeman* has held that [Justice Sotomayor's] opinion is controlling."). The First, Third, and Fourth Circuits reached that conclusion because "the plurality would surely agree that in every case in which a defendant's [Rule 11(c)(1)(C)] plea agreement satisfies the criteria for Justice Sotomayor's exception ... the sentencing judge's decision to accept that sentence is based on the guidelines." *United States v. Rivera-Martínez*, 665 F.3d 344, 348 (1st Cir. 2011); *see also United States v. Thompson*, 682 F.3d 285, 289 (3d Cir. 2012); *United States v. Brown*, 653 F.3d 337, 340 n.1 (4th Cir. 2011). The Tenth Circuit explained that Justice Sotomayor's concurring opinion is the holding in *Freeman* because it is a "middle ground." *United States v. Graham*, 704 F.3d 1275, 1277-78 (10th Cir. 2013). And the Fifth, Sixth, Seventh, Eighth Circuits adopted Justice Sotomayor's concurring opinion after stating the *Marks* rule and then stating that Justice Sotomayor's concurring opinion provides the narrowest ground of agreement. *See United States v. Benitez*, 822 F.3d 807, 811 (5th Cir. 2016); *United States v. Smith*, 658 F.3d 608, 611 (6th Cir. 2011); *United States v. Dixon*, 687 F.3d 356, 359 (7th Cir. 2012); *United States v. Browne*, 698 F.3d 1042, 1045 (8th Cir. 2012).

The decisions of two circuits deviate from this majority view and hold that Justice Sotomayor's

concurring opinion does not provide the narrowest ground of agreement in *Freeman*, but we find their reasoning unpersuasive. The Ninth and D.C. Circuits explained that the rule in *Marks* applies when one opinion is a "logical subset" of another, broader opinion. *See United States v. Davis*, 825 F.3d 1014, 1021-22 (9th Cir. 2016) (*en banc*); *United States v. Epps*, 707 F.3d 337, 350 (D.C. Cir. 2013). Both courts then determined that Justice Sotomayor's concurring opinion is not a logical subset of the plurality opinion but instead offers a different rationale because the concurring opinion focuses on the parties' agreement and the plurality opinion focuses on "the role of the judge's Guidelines calculations in deciding whether to accept or reject the agreement." *Davis*, 825 F.3d at 1022; *see also Epps*, 707 F.3d at 350. But this narrow focus on the rationale of the opinions in *Freeman* is misplaced.

The Supreme Court has not stated that an opinion can qualify as the "narrowest grounds" of decision only when it "represent[s] a common denominator of the Court's reasoning." *Davis*, 825 F.3d at 1020 (quoting *King v. Palmer*, 950 F.2d 771, 781 (D.C. Cir. 1991) (*en banc*)); *see also id.* at 1031 (Bea, J., dissenting) ("The ... 'logical subset' requirement is an invention of the D.C. Circuit that finds no support in *Marks* or any other Supreme Court precedent."). Indeed, the Supreme Court has determined that an opinion is controlling, under *Marks*, even when that opinion does not share common reasoning with the other opinions necessary to support the judgment. *See O'Dell v. Netherland*, 521 U.S. 151, 162 (1997) (adopting Justice White's concurring opinion in *Gardner v. Florida*, 430 U.S 349

(1977), as the "narrowest grounds of decision among the justices whose votes were necessary to the judgment" even though the concurring opinion relied on a different constitutional amendment than the plurality opinion). "After all, in splintered cases, there are multiple opinions precisely because the Justices did not agree on a common rationale." *United States v. Duvall*, 740 F.3d 604, 613 (D.C. Cir. 2013) (Kavanaugh, J., concurring in the denial of rehearing en banc).

Marks itself determined that a plurality opinion governed as the narrowest grounds of decision notwithstanding that none of the justices that concurred in the judgment "*agreed* with the rule enumerated by the ... plurality." *Davis*, 825 F.3d at 1034 (Bea, J., dissenting). *Marks* evaluated which opinion provided the holding of the Supreme Court in *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of the Commonwealth of Massachusetts*, 383 U.S. 413 (1966). The plurality opinion in *Memoirs* determined that literature was protected by the First Amendment unless it satisfied the test of obscenity established by *Roth v. United States*, 354 U.S. 476 (1957). *See Memoirs*, 383 U.S. at 418. Justice Black's and Justice Douglas's concurring opinions in *Memoirs*, in contrast, stated a rule that "the First Amendment provides an absolute shield against governmental action aimed at suppressing obscenity." *Marks*, 430 U.S. at 193. And Justice Stewart's concurring opinion, different still, explained that only hardcore pornography could be suppressed. *Id.* Although six justices agreed that the literature at issue was protected by the First Amendment, only the plurality opinion, joined by

three justices, relied on the test in *Roth* to reach that result. Yet the Supreme Court determined that the plurality opinion governed as the "position taken by those Members who concurred in the judgments on the narrowest grounds," *Id.* (quoting *Gregg*, 428 U.S. at 169 n.15).

The decision in *Marks* that the plurality opinion in *Memoirs* stated the holding makes clear that when no opinion garners a majority of the votes, the opinion that relies on the narrowest grounds necessary to reach the judgment controls. *See also United States v. Santos*, 553 U.S. 507, 523 (2008) (opinion of Scalia, Souter, and Ginsburg, JJ.) (explaining that the holding of the Court was limited by Justice Stevens's concurrence because his vote was necessary to the judgment and his opinion rested upon the narrower ground). As Judge Bea has explained, "*Marks*' emphasis on the Court's 'judgment' demonstrates that it is the ultimate 'vote' of five Justices that is important in determining the binding effect of a splintered Supreme Court opinion." *Davis*, 825 F.3d at 1035 (Bea, J., dissenting). "That is, *Marks* requires us to find a 'legal standard which, when applied, will necessarily produce *results* with which a majority of the Court from that case would agree." *Id.* (quoting *United States v. Williams*, 435 F.3d 1148, 1157 n.9 (9th Cir. 2006)); *see also Duvall*, 740 F.3d at 608 (Kavanaugh, J., concurring in the denial of rehearing *en banc*).

As we see it, Justice Sotomayor's opinion provides a legal standard that produces results with which a majority of the Court in *Freeman* would agree because whenever Justice Sotomayor's opinion would

permit a sentence reduction, the plurality opinion would as well. The plurality opinion stated that because a judge must "evaluat[e] the recommended sentence in [the] light of the defendant's applicable sentencing range" and determine "either that such sentence is an appropriate sentence within the applicable guideline range or, if not, that the sentence departs from the applicable guideline range for justifiable reasons" before the judge accepts the agreement, "the court's acceptance is itself based on the Guidelines." *Freeman*, 564 U.S. at 529 (plurality opinion) (internal quotation marks omitted). Justice Sotomayor's opinion, in contrast, provided two examples in which a sentence imposed according to a plea agreement is "based on a sentencing range." Because the district judge must evaluate the sentencing range before accepting the plea agreement, the plurality opinion would reach the same result as Justice Sotomayor's concurring opinion and determine that, in those two circumstances, the defendant was sentenced "based on a sentencing range" and qualifies for a sentence reduction. As a result, Justice Sotomayor's opinion is the narrower opinion.

When applying the rule of *Marks* to a splintered Supreme Court opinion, we must determine which opinion that supports the judgment relied on the narrowest grounds. Applying this rule to *Freeman*, it is clear that Justice Sotomayor's opinion controls because "'sometimes' is a middle ground between 'always' and 'never.'" Duvall, 740 F.3d at 612 (Kavanaugh, J., concurring in the denial of rehearing en banc). As a result, we must apply Justice Sotomayor's concurring opinion to determine whether

Hughes qualifies for a sentence reduction under section 3582(c)(2).

B. Hughes Is Not Eligible for a Sentence Reduction.

The district court did not abuse its discretion when it determined that Hughes is not eligible for a sentence reduction because Hughes's sentence was not based on a sentencing guidelines range. Justice Sotomayor's opinion explained that a trial judge's acceptance of a binding plea agreement is "based on" a sentencing range when the Rule 11(c)(1)(C) agreement calls for a "defendant to be sentenced within a particular Guidelines sentencing range," or the agreement "make[s] clear that the basis for the specified term is a Guidelines sentencing range applicable to the offense to which the defendant pleaded guilty." *Freeman*, 564 U.S. at 538-39 (Sotomayor, J., concurring in the judgment). Hughes's agreement does neither. His plea agreement does not call for him to be sentenced within a particular sentencing range but instead states that he "should be sentenced to 180 months." And his plea agreement does not "make clear" that the basis for the 180 month recommendation is a guidelines sentencing range.

The plea agreement does not "make clear" that a sentencing range formed the basis for Hughes's sentence. The agreement states that the district court and the probation office will calculate the applicable guidelines range. And the government reserved the right to modify its recommendations about the guidelines. But the agreement does not make any recommendation about a specific application of the Sentencing Guidelines, and the agreement does not

calculate Hughes's range or discuss factors that must be used to determine that range, such as Hughes's criminal history. Nor does it set the agreed-upon sentence within the applicable guideline range. Hughes was not sentenced "based on" a guidelines range, and he is not eligible for a sentence modification under section 3582.

IV. CONCLUSION

We **AFFIRM** the judgment of the district court.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

UNITED STATES OF AMERICA,

v. CRIMINAL ACTION FILE NO.
4:13-CR-043-01-HLM-WEJ

ERIK HUGHES.

ORDER

This case is before the Court on Defendant's Motion to Reduce Sentence—U.S.S.C. Amendment ("Motion to Reduce Sentence") [87].

I. Background

On August 5, 2013, a federal grand jury sitting in the Northern District of Georgia returned an indictment against Defendant and two co-defendants. (Docket Entry No. 6.) Count one of the indictment charged Defendant and his co-defendants with conspiring to possess with intent to distribute at least 500 grams of a mixture and substance containing a detectable amount of methamphetamine, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A)(viii), and 846. (*Id.* at 1.) Count two of the indictment charged that, on or about March 24, 2009, Defendant and a co-defendant possessed with intent to distribute at least 50 grams of methamphetamine, in violation of 21 U.S.C §§ 841(a)(1) and 841(b)(1)(B)(viii) and 18 U.S.C. § 2. (*Id.* at 1-2.) Count three of the

indictment charged Defendant with being a felon in possession of a firearm, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). (*Id.* at 2.) Count four of the indictment charged Defendant with knowingly possessing a firearm that had the manufacturer's serial number obliterated, in violation of 18 U.S.C. § 922(k). (*Id.* at 3.) The indictment also contained a forfeiture provision. (*Id.* at 4-5.)

On December 19, 2013, Defendant pleaded guilty to counts one and three of the indictment under a binding plea agreement. (Docket Entry No. 54.) On March 3, 2014, the Court sentenced Defendant to 180 months of imprisonment on count one, as provided in the binding plea agreement, to be followed by five years of supervised release, and to 120 months on count three, to run concurrently with the sentence imposed on count one and to be followed by three years of supervised release. (Docket Entry No. 68.) On March 4, 2014, the Court entered its Judgment and Commitment Order. (Docket Entry No. 69.)

On June 15, 2015, the Court received Defendant's Motion to Reduce Sentence. (Docket Entry No. 87.) Defendant argues that a recent amendment to the Sentencing Guidelines, Amendment 782, warrants a reduction in Defendant's base offense level and his sentence. (*See generally id.*)

The Government has responded to the Motion to Reduce Sentence, arguing that the Court may not use Amendment 782 to decrease Defendant's term of imprisonment. (*See generally* Resp. Mot. Reduce Sentence (Docket Entry No. 94).) The time period in which Defendant could file a reply in support of his

Motion to Reduce Sentence has expired, and the Court therefore finds that the Motion is ripe for resolution.

II. Discussion

The Court agrees with the Government that Defendant is not entitled to a sentence reduction under Amendment 782. Federal Rule of Criminal Procedure 11(c)(1) provides, in relevant part:

> An attorney for the government and the defendant's attorney, or the defendant when proceeding *pro se*, may discuss and reach a plea agreement. The court must not participate in these discussions. If the defendant pleads guilty or nolo contendere to either a charged offense or a lesser or related offense, the plea agreement may specify that an attorney for the government will:
>
> ...
>
> (C) agree that a specific sentence or sentencing range is the appropriate disposition of the case, or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply (such a recommendation or request binds the court once the court accepts the plea agreement).

Fed. R. Crim. P. 11(c)(1).

In *Freeman v. United States*, 131 S. Ct. 2685 (2011), the Supreme Court considered "whether defendants who enter into plea agreements that recommend a particular sentence as a condition of the guilty plea may be eligible for relief under § 3582(c)(2)." 131 S. Ct. at 2689. The United States Court of Appeals for the Sixth Circuit "held that, barring a miscarriage of justice or mutual mistake, defendants who enter into 11(c)(1)(C) agreements cannot benefit from retroactive Guideline amendments." *Id.* Five members of the Supreme Court agreed that the Sixth Circuit's judgment was due to be reversed. *Id.* Four justices noted that:

> The district court's decision to impose a sentence may ... be based on the Guidelines even if the defendant agrees to plead guilty under Rule 11(c)(1)(C). Where the decision to impose a sentence is. based on a range later subject to retroactive amendment, § 3582(c)(2) permits a sentence reduction.

Id. Those justices concluded:

> Even when a defendant enters into an 11(c)(1)(C) agreement, the judge's decision to accept the plea and impose the recommended sentence is likely to be based on the Guidelines; and when it is, the defendant should be eligible to seek § 3582(c)(2) relief. This

> straightforward analysis would avoid making arbitrary distinctions between similar defendants based on the terms of their plea agreements. And it would also reduce unwarranted disparities in federal sentencing, consistent with the purposes of the Sentence Reform Act.

Id. at 2695.

Justice Sotomayor, in a concurring opinion, agreed that Freeman was eligible for a sentence reduction, but for a different reason. *Freeman*, 131 S. Ct. at 2695. Justice Sotomayor noted:

> In my view, the term of imprisonment imposed by a district court pursuant to an agreement authorized by Federal Rule of Criminal Procedure 11(c)(1)(C)((C) agreement) is "based on" the agreement itself, not on the judge's calculation of the Sentencing Guidelines. However, I believe that if a(C) agreement expressly uses a Guidelines sentencing range applicable to the charged offense to establish the term of imprisonment, and that range is subsequently lowered by the United States Sentencing Commission, the term of imprisonment is "based on" the range employed and the defendant is eligible for sentence reduction under § 3582(c)(2).

Id. Justice Sotomayor observed that, in the context of an agreement under Rule 11(c)(1)(C), "[t]he term of imprisonment imposed by the sentencing judge is dictated by the terms of the agreement entered into by the parties, not the judge's Guidelines calculation." *Id.* at 2696. Thus, in her view, "the term of imprisonment imposed pursuant to a (C) agreement is, for purposes of § 3582(c)(2), 'based on' the agreement itself." *Id.* Justice Sotomoyor observed:

> To hold otherwise would be to contravene the very purpose of (C) agreements—to bind the district court and allow the Government and the defendant to determine what sentence he will receive. Although district courts ordinarily have significant discretion in determining the appropriate sentence to be imposed on a particular defendant, under Rule 11(c)(1)(C) it is the parties' agreement that determines the sentence to be imposed. To be sure, the court retains absolute discretion whether to accept a plea agreement, but once it does it is bound at sentencing to give effect to the parties' agreement as to the appropriate term of imprisonment.
>
> Allowing district courts later to reduce a term of imprisonment simply because the court itself considered the Guidelines in deciding whether to accept the agreement would transform § 3582(c)(2) into a mechanism by which

> courts could rewrite the terms of (C) agreements in ways not contemplated by the parties. At the time that § 3582(c)(2) was enacted in 1984, it was already well understood that, under Rule 11, the term of imprisonment stipulated in a (C) agreement bound the district court once it accepted the agreement.

Id. (internal quotation marks, citations, and footnote omitted).

Justice Sotomayor, however, noted that a term of imprisonment imposed under a Rule 11(c)(1)(C) agreement still could be reduced under § 3582(c)(2) under certain circumstances. *Freeman*, 131 S. Ct. at 2697-98. She observed:

> For example, Rule 11(c)(1)(C) allows the parties to agree that a specific ... sentencing range is the appropriate disposition of the case. In delineating the agreed-upon term of imprisonment, some (C) agreements may call for the defendant to be sentenced within a particular Guidelines sentencing range. In such cases, the district court's acceptance of the agreement obligates the court to sentence the defendant accordingly, and there can be no doubt that the term of imprisonment the court imposes is "based on" the agreed-upon sentencing range within the meaning of § 3582(c)(2). If that

> Guidelines range is subsequently lowered by the Sentencing Commission, the defendant is eligible for sentence reduction.
>
> Similarly, a plea agreement might provide for a specific term of imprisonment—such as a number of months—but also make clear that the basis for the specified term is a Guidelines sentencing range applicable to the offense to which the defendant pleaded guilty. As long as that sentencing range is evident from the agreement itself, for purposes of § 3582(c)(2) the term of imprisonment imposed by the court in accordance with that agreement is "based on" that range. Therefore, when a (C) agreement expressly uses a Guidelines sentencing range to establish the term of imprisonment, and that range is subsequently lowered by the Commission, the defendant is eligible for sentence reduction under § 3582(c)(2).

Id. (alteration in original) (footnote omitted).

Most of the appellate courts that have considered this issue have concluded that Justice Sotomayor's standard is the applicable one. *See United States v. Graham*, 704 F.3d 1275, 1278 (10th Cir. 2013) ("Every federal appellate court to consider the matter has reached the same conclusion, and we

agree: Justice Sotomayor's concurrence is the narrowest grounds of decision and represents the Court's holding."); *United States v. Browne*, 698 F.3d 1042, 1045 (8th Cir. 2012) ("It is Justice Sotomayor's concurring opinion in *Freeman* that is controlling and represents the holding of the Court."); *United States v. Dixon*, 687 F.3d 356, 359 (7th Cir. 2012) ("Even though eight Justices disagreed with Justice Sotomayor's approach and believed it would produce arbitrary and unworkable results, her reasoning provided the narrowest, most case-specific basis for deciding *Freeman*. Her approach therefore states the controlling law." (citations omitted)); *United States v. Thompson*, 682 F.3d 285, 290 (3d Cir. 2012) ("[B]ecause Justice Sotomayor's opinion is narrower than Justice Kennedy's, it expresses the holding of the Court."); *United States v. Austin*, 676 F.3d 924, 927 (9th Cir. 2012) ("Justice Sotomayor's concurrence is the controlling opinion because it reached this conclusion on the narrowest grounds." (internal quotation marks and citation omitted)); *United States v. Rivera-Martinez*, 665 F.3d 344, 348 (1st Cir. 2011) ("Justice Sotomayor's concurrence delineates the narrowest grounds on which at least five Justices agree. It is, therefore, the controlling opinion."); *United States v. Brown*, 653 F.3d 337, 340 (4th Cir. 2011) ("Under the fragmented opinion, Justice Sotomayor's rationale becomes the Court's holding." (footnote omitted)); *but see United States v. Epps*, 707 F.3d 337, 350 (D.C. Cir. 2013) ("[W]e conclude that there is no controlling opinion in *Freeman* because the plurality and concurring opinions do not share common reasoning whereby one analysis is a logical subset of the other." (internal quotation marks and

citation omitted)). In an unpublished opinion, the United States Court of Appeals for the Eleventh Circuit noted that "Justice Sotomayor's concurrence 'can be viewed as the holding in *Freeman*.'" *United States v. Hudson*, 550 F. App'x 793, 795 (11th Cir. 2013) (*per curiam*) (quoting *United States v. Lawson*, 686 F.3d 1317, 1321 n.2 (11th Cir. 2012)). The Court follows the majority's approach, and concludes that Justice Sotomayor's concurrence is the holding in *Freeman*.

The United States Court of Appeals for the First Circuit has observed that "Justice Sotomayor allows for eligibility [for reduction under § 3582(c)(2)] when the agreement itself expressly indicates that the term of imprisonment is based on a guideline sentencing range that has subsequently been reduced by the Sentencing Commission." *Rivera-Martinez*, 665 F.3d at 348. According to the First Circuit, this event will occur in "two scenarios." *Id.* Under the first scenario, "a C-type plea agreement calls for a sentence within an identified sentencing range." *Id.* Under the second scenario, the terms contained within the four corners of the plea agreement will warrant a finding that the basis for a specified term of imprisonment is a Guidelines sentencing range. *Id.* at 34849;[1] *see also*

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[1]In *Rivera-Martinez*, the defendant argued that he was entitled to relief under the second scenario. 665 F.3d at 349. The defendant noted "that the Agreement mentions some guideline components (including a total offense level) as well as a specified drug quantity," and contended that those references "ma[d]e it hard to believe that the guidelines did not figure into the agreed sentence." *Id.* The First Circuit rejected that argument, noting:

The defendant's reasoning is plausible, but he is answering the wrong question. Justice Sotomayor's concurrence expressly rejects an inferential approach. She acknowledges that a term of imprisonment in a C-type plea agreement will most often be negotiated by reference to the relevant guideline provisions. Yet under the rationale 'of the concurrence, this linkage is not enough to warrant a finding that the ensuing sentence is based on the guidelines. Justice Sotomayor makes it pellucid that the proper focus is neither the guideline calculations that the judge may perform before deciding whether to accept the agreement, nor the mere fact that the parties ... may have considered the Guidelines in the course of their negotiations. Rather, it is the terms contained within the four corners of the plea agreement that matter.

Silhouetted against this backdrop, the concern that we voiced [in an earlier decision in the case] echoes still. The Agreement does not identify any guideline sentencing range. Moreover, the Agreement does not contain any information about the defendant's criminal history category. This silence about a criminal history category makes it impossible to conclude from the Agreement alone that the proposed sentence is based on a specific sentencing range. The integers needed to trigger the exception carved out by Justice Sotomayor are not present here.

A comparison of the Agreement with the plea agreement in *Freeman* is telling. The latter agreement contained an explicit stipulation to *both* an offense level and a criminal history category. When Justice Sotomayor turned to the sentencing table with these coordinates in

United States v. Scott, 711 F.3d 784, 787 (7th Cir. 2013) ("A defendant who agrees to a specific sentence in a plea agreement under Rule 11(c)(1)(C) generally is not eligible to receive a reduced sentence under § 3582(c)(2) because that statute does not grant relief for sentences based not on a guidelines range, but on an agreed term. The only exceptions occur when the plea agreement specifies that the sentence must be within an identified guidelines range or states that the basis for an agreed term is a particular sentencing range." (citations omitted)).

Applying Justice Sotomayor's concurrence, Defendant is not entitled to relief under § 3582(c)(2) because his original sentence was not tied to the Sentencing Guidelines calculations. Under the plea

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> hand, she could identify with certainty a particular sentencing range. In this case, the Agreement does not permit such certitude. As we have explained, one of the two essential coordinates is missing.
>
> The short of it is that we cannot identify a referenced sentencing range from the Agreement alone. We would have to supplement the Agreement with either the parties' background negotiations or the facts that informed the sentencing judge's decision to accept the plea. Justice Sotomayor's concurrence forbids us from making such an archeological dig. We therefore conclude that the defendant is not eligible for a sentencing reduction under section 3582(c)(2).

Id. at 349-50 (emphasis and first alteration in original) (internal quotation marks, citations, and footnotes omitted).

agreement, the Government and Defendant agreed that "Defendant and the Government expressly recommend that the Court should impose a sentence of 180 months of imprisonment as the appropriate custodial sentence in this case." (Plea Agreement (Docket Entry No. 54) at 4-5.) The plea agreement further provided: "Under the provisions of Fed. R. Cr. P. 11(c)(1)(C), this recommendation would bind the Court to impose this particular custodial sentence if the Court accepts this plea agreement." (*Id.* at 5.) The plea agreement also stated: It is abundantly clear that Defendant's sentence was not linked or tied to the Sentencing Guidelines. Indeed, the plea agreement does not mention an otherwise applicable Sentencing Guidelines range or Defendant's criminal history, and Defendant's criminal history category is not evident from the Agreement itself. Under those circumstances, the Court cannot determine that Defendant's plea agreement identified a Sentencing Guidelines range. *See Scott*, 711 F.3d at 787 (concluding that the defendant was not entitled to a reduction under § 3582(c)(2) where the defendant's Rule 11(c)(1)(C) "plea agreement did not identify a guidelines range or suggest that the agreed-upon sentence was based on the guidelines"); *United States v. Weatherspoon*, 696 F.3d 416, 424 (3d Cir. 2012) ("Because his agreement does not explicitly state his Guidelines range, or his offense level and criminal history category, and because Weatherspoon cannot otherwise demonstrate that his criminal history category is evident from the agreement itself, we cannot conclude that the agreement identifies a Guidelines range. Thus, his claim falls under *Freeman* and his motion was properly denied."

(internal quotation marks and citation omitted);[2] *United States v. Austin*, 676 F.3d 924, 930 (9th Cir. 2012) (concluding that the defendant was not entitled to a reduction under § 3582(c)(2) where his Rule 11(c)(1)(C) plea agreement "simply provide[d] for a specific term of seventeen years," "[n]o sentencing range appear[ed] on the face of the plea agreement that could have formed the basis for the specific term

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[2]In *Weatherspoon*, the United States Court of Appeals for the Third Circuit noted:

> In this case, the parties agreed in the (C) plea agreement that Weatherspoon should receive a fixed sentence of 120 months' imprisonment. Thus, Weatherspoon falls into Justice Sotomayor's second category—where the defendant's agreement calls for a specific term of imprisonment. Confining our analysis solely to the four corners of the plea agreement, we conclude that the agreement does not "make clear" that the foundation of his sentence was the Guidelines, because the agreement does not in any way identify or rely on Weatherspoon's Guidelines range. In fact, the agreement is silent as to his range. Nowhere in the agreement does it explicitly state the range the parties relied upon in determining his sentence. Nor does the agreement provide the necessary ingredients to calculate it. The Guidelines range can only be derived from a determination of a defendant's criminal history category and his offense level. Here, we are missing at least one-half of the equation. There are simply no statements or assertions of fact in the agreement that allow us to determine Weatherspoon's criminal history category.

696 F.3d at 424.

of seventeen years," and "[t]he terms of the agreement [did] not make clear[] that any particular Guidelines range was employed" (internal quotation marks and citation omitted)); *Brown*, 653 F.3d at 340 (finding Rule 11(c)(1)(C) plea agreement "does not expressly use a Guidelines sentencing range to establish his term of imprisonment" where the "plea agreement simply states that the appropriate sentence in this case is incarceration for not less than 180 months and not more than 240 months" (internal quotation marks, citation, and footnote omitted)). Defendant therefore is not entitled to relief under § 3582(c)(2) based on Amendment 782.

III. Conclusion

ACCORDINGLY, the Court **DENIES** Defendant's Motion to Reduce Sentence [87].

IT IS SO ORDERED, this the 6th day of November, 2015.

/s/ Harold L. Murphy
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

UNITED STATES OF AMERICA	)	DOCKET NUMBER 4:13-CR-43-HLM
	)	
	)	
V.	)	
	)	ROME, GEORGIA
	)	MARCH 3, 2014
ERIK LINDSEY HUGHES	)	
	)	
	)	

TRANSCRIPT OF SENTENCING HEARING
BEFORE THE
HONORABLE HAROLD L. MURPHY
UNITED STATES DISTRICT JUDGE

APPEARANCES OF COUNSEL:

FOR THE GOVERNMENT: MS. ANGELA GARLAND

FOR THE DEFENDANT: MR. BRIAN MENDELSOHN

OFFICIAL COURT REPORTER: ALICIA B. BAGLEY, RMR, CRR

PROCEEDINGS RECORDED BY MECHANICAL STENOGRAPHY, TRANSCRIPT PRODUCED BY COMPUTER

P R O C E E D I N G S

[In Rome, Floyd County, Georgia; March 3, 2014; in open court; defendant present.]

THE CLERK: Please come to order and be seated. I'll sound the case of United States of America vs. Erik Hughes.

MS. GARLAND: Good afternoon, Your Honor. I'm Angela Garland. I represent the United States.

THE COURT: Good afternoon.

MR. MENDELSOHN: Good afternoon, Judge. Brian Mendelsohn on behalf of Mr. Hughes.

THE COURT: Good afternoon.

Mr. Hughes, have you read this presentence report and been over it with your lawyer?

THE DEFENDANT: Yes, sir.

THE COURT: Do you understand it fairly well?

THE DEFENDANT: Yes, sir.

THE COURT: The Court has reviewed the plea agreement in this case and notes that it is a binding plea agreement. I've considered the allegations of the presentence report, all undisputed. I've considered

the plea agreement, the sentencing guidelines, particularly the provisions of Title 18 of the United States Code, Section 3553(a), and the Court will accept and approve the binding plea agreement.

Having considered all of these items that I've spoken with you about and commented about, the Court finds that it will result in a reasonable sentence that's in the best interest of the Government, the best interest of society, and the best interest of the defendant. It complies not only with the spirit of the advisory United States Sentencing Guidelines, but it complies with the principles of fairness and justness and specific provisions of Section 3553(a) and is a reasonable sentence without any unreasonable disparity between the sentence imposed in this case, pursuant to the binding plea agreement, and sentences imposed upon other defendants with similar backgrounds and similar offenses.

The Court, as I've said, has reviewed the plea agreement itself; I've reviewed the indictment; the comments and objections to the presentence report; the addendum to the presentence report; the findings of facts and conclusions contained in the presentence report, and the Court adopts all of the findings of fact and conclusions contained in the presentence report as prepared by the United States Probation Officer and makes all of those findings of fact and conclusions those of the Court in all respects except as to unresolved guideline issues that I'll speak to in a moment.

The amount of drugs for which the defendant is responsible in this case are set out in Paragraph 31

and the drugs for which he's responsible results in a total Offense Level of 34. The probation officer initially added 2 points pursuant to Section 32 and noted an objection.

Does the Government disagree with the objection that Mr. Mendelsohn has to that 2 points?

MS. GARLAND: The role in the offense, Your Honor; is that correct?

THE COURT: It's possession of a gun in connection with a drug offense and the issue is whether or not that is applicable in view of the fact that he's charged in Count Three with the same gun.

MS. GARLAND: I think it would be applicable had he not pled guilty to the firearm offense, but because he's pled to a firearm offense the Government doesn't have an objection to the Court not applying that enhancement.

THE COURT: All right. You stand by the objection, I assume, Mr. Mendelsohn?

MR. MENDELSOHN: I would, Judge. I would also object to the factual paragraph in Paragraph 24 which is the statement by the codefendant that brings this issue into play. It's basically his word against hers about that particular issue. I have concerns that that paragraph may cause issues with the Bureau of Prisons. For example, getting into drug programs or security levels. So I ask the Court to remove that paragraph going forward.

THE COURT: All right. I'll sustain your objection and I'll ask the probation officer to redact that particular paragraph, as alleged, from the presentence report that will go to the Bureau of Prisons.

That will change your guideline range without objection. The guideline range will be 32 based on the amount of drugs and there is an issue of acceptance of responsibility. The Government recommends a third point?

MS. GARLAND: Yes, Your Honor.

THE COURT: That would take it to 29, then. Level 29 is a Criminal History Category of 36—Criminal History Category of VI, 151 to 188; am I not correct?

THE PROBATION OFFICER: Your Honor, the drugs were a Level 34.

THE COURT: Well, we gave 3 points credit for acceptance of responsibility.

THE PROBATION OFFICER: Yes, Your Honor.

THE COURT: And we took off the 2 points. Oh, I see what you're talking about. 34 to begin with and 2 points would be 31 then?

MS. GARLAND: That's the one I show, 31, Criminal History Category VI.

THE COURT: 31?

MR. MENDELSOHN: Yes, sir.

THE COURT: All right. 168 to 210. Thank you for finally getting it right.

MS. GARLAND: Judge, not to be picky since it's a binding plea, but my notes show 188 to 235 because what Offense Level 31, Criminal History Category VI would be.

THE COURT: Yes, I agree with you about that. We're back to what I had originally put down before I came in here.

So the Court's sentencing options without regard to the binding plea agreement is on Count One a minimum mandatory 10 years up to life and a $10 million fine. On Count Three not more than 10 years and a $250,000 fine. The total Offense Level is 31. The Criminal History Category is VI. Custody guideline range on Count One is 188 to 235 months. The fine guideline range—of course, then we've got Count Three. The fine guideline range is $17,500 to $10,250,000. There's no restitution. A $200 mandatory special assessment is required as part of the sentence. Cost of confinement is estimated at $28,948 a year. The cost of supervision is estimated at $3,347.41 a year. Probation is not an option the Court may consider. There is a forfeiture provision. Supervised release of at least 5 years is required as a part of the sentence on Count One and not more than 3 years supervised release on Count Three.

I'll be glad to hear from counsel on sentencing and the defendant. And I understood that one of the

defendant's relatives is here and may want to address the Court. Defense counsel can let me know about whether or not that is requested.

MR. MENDELSOHN: Yes, Judge. His 14-year-old daughter, Shayla Hughes, is here and would like to address the Court.

THE COURT: I'll be happy to hear from her.

MR. MENDELSOHN: And his mother also is here.

THE COURT: All right. I'll be glad to hear from both of them.

MR. MENDELSOHN: Great. Thank you, Judge.

MS. HUGHES: Good afternoon. They say your dad is the only person you really trust, but I lost mine. It's been over 10 years this time. Everyone tells me I should be—I should be getting over it by now, but it seems like it's only getting worse. This is anything but new. I remember the first time he got caught. He told me he was going to change. Why am I here speaking today? Because of the power methamphetamines have in his life, leaving him to make foolish choices and decisions.

You don't really know my dad, but doing your job in this federal system, you caught my dad doing wrong. That couldn't change the fact my dad is a good man. He's loving, caring, helpful and a strong man when he's completely sober. You see him covered with

tattoos, he seems like he's a tough guy, but he's a big guy with an addiction, not able to be on his own.

If you start at the age I currently am now, being 14 years old, methamphetamine had him before he turned 16. Before in 2007 my dad promised me he was going to change, but it always slipped through his fingers. He stayed clean 16 months without any problem with family support. I tried to help. I begged him to stop and I'd do anything to have my dad back, but not the old dad, the one that loved me and took care of me.

It's been hard growing up for me. My dad was here unless he was in jail or prison. Usually my unsupportive mom, she threw me off one hand when I was a baby, yet has my brother weekly unless she needs something. I know in my heart they loved me, but it's hard to get past that.

My grandparents, as I grow up, I see their health deteriorate. I'll not be able to call my parents when I need advice. My dad calls me. I had two visits with him for 2013. I'll be the first person to tell you that a 30-minute visitation goes by fast.

I wish my dad would be here to see me walk down the aisle and hear me say those famous words "I do," be here with my kids. He's not going to see me walk across the stage on graduation, come to senior prom. My dad's helped me to be brave. I try not to cry. I love my dad. Nobody knows but myself. My dad isn't the only person I've lost. In 2007 I lost my grandpa due to a meth overdose. My mom has been a meth addict before, too.

The only bit of peace with my dad is being the fact he's supposed to be safe. Now there's some hope your system will be able to overcome his addiction. I have to live off memories my dad and I made together. They say I'm strong. Obviously that means I have no feelings and I can be ignored. Am I strong? My dad asked myself daily why can't he stop. I hate saying meth ruined my world when I wasn't even the person using it. I guess that's really powerful of a drug.

I want you to know that my dad isn't just 65026-019. He has friends, family, and a daughter at home. None of this is my dad. There's nothing I can say or do that is—there's nothing I can say or do anymore to help besides support my dad through all the years he's facing. The only thing I can ask for is some sort of mercy on him.

This is for anyone with a drug addiction. Teardrops fall. My life falls. A pain in my body, pain in my heart. So many broken people, so many broken souls. They've been through so much pain. Not the smartest person knows life is a battle, life is a fight, every day drags, every night. [Unintelligible.] Everyone is special I see in this room, they're all making changes not the way they assumed. They take it step by step. They done wrong, they know they made mistakes. Teardrops fall means always shine in cloudy weather.

THE COURT: Thank you.

MR. MENDELSOHN: Judge, this is Cathy Duckworth, his mother.

THE COURT: Good afternoon.

MS. DUCKWORTH: Your Honor, I know this is a bad day for you, a terrible day for you.

THE COURT: I'll be glad to hear from you.

MS. DUCKWORTH: You know, now, sitting right there thinking what I wanted to say to you, Your Honor, I decided I'd like to tell you a little bit about my son growing up and some things are bad. I had to work. I don't have a high school education. I worked making $4 an hour. I did have a deadbeat husband that beat on my children, but I had to provide a roof over their head. I struggled. There were times that I had my power cut off and everything else, but I kept pushing through for my children. And then I got in charge and the Lord saved me one day and I thank God for that, and then my husband got in church with me. My kids were little and he was in a singing group then. He run off with a woman and got married to her which y'all don't know me, but the Lord knows me, and I've struggled trying to raise my kids. I've always had to work until about three years ago. I've got COPD, I've got emphysema. They went down with a light and told me my lungs was black. I've been struggling with this disease now. If you'd seen me six months ago you would have said I was healthy as a horse, but I've dropped 40 pounds. I've been going back and forth to the doctor. I've got to go March the 12th. They wanting to send me to a cancer doctor to see if they can find something because of the weight. I'm a mom. I love my children, God knows I do. I stay on my knees and I thank God my son is safe, I really do. I want to thank you. But the time he is missing

with his daughter, he's not—I think he more or less got caught up into this about the money. I know he was set up and it was all about the money. But my son's an addict and he needs help with his drug addiction—addiction, I can't talk right.

But I would ask you—beg you for mercy. If there's any way possible you could reduce his sentence just by a little bit, just by a little bit so he can have that time with his daughter. We're trying to raise Shayla right now. Erik's really a good person when he's straight and he's working. I mean, he has really helped us with her. I don't know what else to say. I love my son, I really do. I love him and I want what's best for him and I want what's best for his daughter. I know that the 15 years that he's looking at, I'm not going to be here, I do know that.

THE COURT: Well, I'm going to put some provisions in this sentence that will do part of what you're asking. I'm going to give him some provisions that will help him while he's in prison and help him when he gets out.

MR. MENDELSOHN: Well, Judge—

THE COURT: And I know you love your son dearly and this is not a pleasant day for me and not a pleasant day for you or anybody in the courtroom.

MR. MENDELSOHN: Judge, I don't know that I can say anything much better than what Shayla and Ms. Duckworth have said, but I think you see from them that this is about somebody who has an addiction and that addiction has controlled him for a

large part of his adult life. But the fact that he's got a daughter who's as special and fabulous as she is at age 14 and says the kind of things she said to you today I think shows that he has been a good influence on her and he has done well by her and hopefully will continue to do that in the future.

So with that, we would, of course, ask the Court to accept the binding plea and understand who Mr. Hughes is and where he will end up once he gets out from this. I also would like the Court—to thank the Court for hearing from these two people, especially Shayla, because I think it was very important for her to say those words, both to the Court and to her father.

THE COURT: Thank you, Mr. Mendelsohn.

If you'd come around, Mr. Hughes.

Ms. Garland, anything you want to say?

MS. GARLAND: Judge, I would just stand by the Government's recommendation that this be a binding plea binding on the Court and on the defendant for 180 months.

THE COURT: All right.

MS. GARLAND: We make this recommendation in light of the fact that he was facing life without parole with his prior convictions and the kind of drug quantities that were involved here and so although it seems like a very harsh sentence, being 15 years, it's much better than what he would have faced, up to 20.

THE COURT: Thank you.

Anything you want to say, Mr. Hughes?

THE DEFENDANT: Yes, sir.

First, I'd like to apologize to my family for being here. I've let methamphetamines ruin my life and I'm 1 sorry. I'm sorry for you having to hear this case today. I would just ask for some leniency, if you could. I know I've got to pay for the crime I committed. I don't want to say the wrong thing and try to break my binding plea so I would just ask you to be as lenient as you could, if you could. I was selling drugs to support my habit. I'm not a sex offender, I'm not a violent person, I don't have any of those kind of crimes. I'm just a full-fledged junky, that's it, with a habit. I've never prospered anything from it except for my ways of being able to support my addiction, that's it. I worked here and there at times, but I've always been able to support my addiction through drugs and that's the wrong way to go about it, that's the wrong style of life and I just—like I said, I was working for my codefendant to pay for my addiction and what's crazy about it is the man I worked for never even used drugs in his life and could allow me to be in the situation I'm in to support my habit and I just—like I said, I ask for any leniency, if you could. I know there's a minimum of 10 years, but the prosecutor's right, I could be facing life or getting life, but I just—I don't really know what else to say. I'm scared of breaking this plea agreement.

THE COURT: Well, you're not breaking it. Wait a minute. I need to pronounce the sentence. I

had a very thorough plea, a very thorough presentence report in this case, and I know that your mother's had a tough time and been very supportive of you, and this habit you've got is hell for you and your family.

Pursuant to the Sentencing Reform Act of 1984, it's the judgment of the Court that the defendant, Erik Hughes, be and is hereby committed to the custody of the Bureau of Prisons to be imprisoned for a term of 180 months as to Count One and 120 months as to Count Three to be served concurrently with Count One for a total sentence of 180 months.

It's further ordered that the defendant shall pay to the United States a mandatory special assessment of $200 which shall be due immediately. The Court finds that the defendant does not have the ability to pay a fine and the cost of incarceration and the Court will waive a fine and the cost of incarceration in this case.

Upon release from imprisonment the defendant shall be placed on supervised release for a period of 5 years as to Count One and 3 years as to Count Three with Count Three to run concurrent with Count One.

Within 72 hours of release from the custody of the Bureau of Prisons the defendant shall report in person to the United States Probation Office in the district to which the defendant is released. While on supervised release the defendant shall not commit another federal, state or local crime, shall comply

with the standard conditions that have been adopted by this Court, and shall comply with the following additional conditions:

The defendant shall refrain from any unlawful use or possession of a controlled substance and submit to one drug urinalysis within 15 days after being placed on supervision and at least two periodic tests thereafter.

The defendant shall not own, possess or have under his control any firearm, dangerous weapon or other destructive device. The defendant shall submit to a search of his person, property, both real, personal or rental, residence, office, and vehicle at reasonable times in a reasonable manner based upon reasonable suspicion of contraband or evidence of a violation of a condition of release. Failure to submit to a search may be grounds for revocation. The defendant shall warn any other residents of the premises that same are subject to searches pursuant to this condition of supervised release. The defendant shall participate in a drug and alcohol treatment program as directed by the United States Probation Officer and, if able, contribute to the cost of such services.

The defendant shall participate in a mental health evaluation and counseling, if deemed necessary or appropriate by the United States Probation Officer, and, if able, the defendant shall be required to contribute to the cost of services for such treatment. The defendant shall perform 100 hours of community service as directed by the United States Probation Officer in lieu of a payment of a fine or the cost of incarceration in this case.

Pursuant to 42 USC, Section 14135a(d)(1) and 10 USC, Section 1565(d), which requires mandatory DNA testing for federal offenders involving a felony offense, the defendant shall cooperate in the collection of a DNA sample as required by the United States Probation Officer.

The Court enters a forfeiture order upon the following items. $14,124 in United States currency seized from Erik Hughes on April the 19th, 2013; a Smith & Wesson 357-caliber pistol with an obliterated serial number seized from Erik Hughes referenced in Count Three of the indictment; $36,670—$970 in United States currency seized from Joshua Andrews on April the 19th, 2013, same hereby being forfeited.

The Court recommends that the defendant be allowed to participate in the 500-hour intensive drug and alcohol treatment program while incarcerated.

Do you have any requests as to where the Court should recommend that this gentleman be allowed to serve his sentence, Mr. Mendelsohn?

MR. MENDELSOHN: Judge, as close to Dalton as possible.

THE COURT: The Court recommends that this defendant be allowed to serve his sentence at the federal facility at Talladega, Alabama, or some other place in the general area of north Georgia.

You have a right to appeal to a higher court from what the Court's done in this case, to the extent

you've not given up your right to appeal to a higher court. If you do want to appeal to a higher court, you have to do so within 14 days from today or you forever lose your right to appeal to a higher court.

If you want to appeal to a higher court and you don't have the money to hire a lawyer to handle your case on appeal, the Court will appoint a lawyer to represent you on appeal and you can appeal to a higher court without any cost whatsoever to yourself.

In imposing this sentence the Court has accepted the binding plea agreement between the parties. I explained at the time of approving the binding plea agreement the reasons I've done so and for the reasons that I've stated at that time, the Court concludes and finds that it has imposed a reasonable sentence in this case compatible with the advisory United States Sentencing Guidelines but in accordance with the mandatory matters the Court is required to consider in ultimately determining a sentence.

The Court would state for the record that in the opinion of the Court the Government has acted very reasonably in connection with their recommendation in this case and defense counsel has acted very reasonably with his recommendation in this case as to what each lawyer believes to be a fair and reasonable sentence under the circumstances.

The Court is convinced it has imposed a reasonable sentence and the judgment of the defendant himself accepting this plea is the judgment of an individual who has the ability to overcome his addiction and be

a productive citizen, and I hope you'll maintain that sense of logic, Mr. Hughes.

If there's nothing further, then, that completes the sentencing in the case.

Do you want to put an exception in the record, Mr. Mendelsohn?

MR. MENDELSOHN: No, Judge. Thank you.

THE COURT: Ms. Garland?

MS. GARLAND: Nothing from the Government, Your Honor.

THE COURT: All right. We'll be in recess.

THE CLERK: All rise, please. This Honorable Court's in recess until further order.

[proceedings concluded at 2:25 p.m.]

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF GEORGIA

CERTIFICATE OF REPORTER

I do hereby certify that the foregoing pages are a true and correct transcript of the proceedings taken down by me in the case aforesaid.

This the 2nd day of February, 2016.

/S/ Alicia B. Bagley
ALICIA B. BAGLEY, RMR, CRR

OFFICIAL COURT REPORTER
(706) 378-4017

APPENDIX D

GUILTY PLEA and PLEA AGREEMENT

United States Attorney
Northern District of Georgia

ORIGINAL

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ROME DIVISION
CRIMINAL NO. 4:13-CR-43-HLM-WEJ

The United States Attorney for the Northern District of Georgia ("the Government") and Defendant ERIK HUGHES, enter into this plea agreement as set forth below in Part IV pursuant to Rule 11 (c)(1)(C) of the Federal Rules of Criminal Procedure. ERIK HUGHES, Defendant, having received a copy of the above-numbered Indictment and having been arraigned, hereby pleads GUILTY to Counts One and Three.

I. ADMISSION OF GUILT

1. The Defendant admits that he is pleading guilty because he is in fact guilty of the crimes charged in Counts One and Three.

II. ACKNOWLEDGMENT & WAIVER OF RIGHTS

2. The Defendant understands that by pleading guilty, he is giving up the right to plead not guilty and the right to be tried by a jury. At a trial, the Defendant

would have the right to an attorney, and if the Defendant could not afford an attorney, the Court would appoint one to represent the Defendant at trial and at every stage of the proceedings. During the trial, the Defendant would be presumed innocent and the Government would have the burden of proving him guilty beyond a reasonable doubt. The Defendant would have the right to confront and cross-examine the witnesses against him. If the Defendant wished, he could testify on his own behalf and present evidence in his defense, and he could subpoena witnesses to testify on his behalf. If, however, the Defendant did not wish to testify, that fact could not be used against him, and the Government could not compel him to incriminate himself. If the Defendant were found guilty after a trial, he would have the right to appeal the conviction.

3. The Defendant understands that by pleading guilty, he is giving up all of these rights and there will not be a trial of any kind.

4. By pleading guilty, Defendant also gives up any and all rights to pursue any affirmative defenses, Fourth Amendment or Fifth Amendment claims, and other pretrial motions that have been filed or could have been filed.

5. The Defendant also understands that he ordinarily would have the right to appeal his sentence and, under some circumstances, to attack the conviction and sentence in post-conviction proceedings. By entering this Plea Agreement, the Defendant may be waiving some or all of those rights

to appeal and to collaterally attack his conviction and sentence, as specified below.

6. Finally, the Defendant understands that, to plead guilty, he may have to answer, under oath, questions posed to him by the Court concerning the rights that he is giving up and the facts of this case, and the Defendant's answers, if untruthful, may later be used against him a prosecution for perjury or false statements.

III. ACKNOWLEDGMENT OF PENALTIES

7. The Defendant understands that, based on his plea of guilty, he will be subject to the following maximum and mandatory minimum penalties:

As to Count One:

a. Maximum term of imprisonment: Life.

b. Mandatory minimum term of imprisonment: 10 years.

c. Term of supervised release: 5 year(s) to Life.

d. Maximum fine: $10,000,000.00, due and payable immediately.

e. Full restitution, due and payable immediately, to all victims of the offense(s) and relevant conduct.

f. Mandatory special assessment: $100.00, due and payable immediately.

g. Forfeiture of any and all proceeds from the commission of the offense, any and all property used or intended to be used to facilitate the offense, and any property involved in the offense.

As to Count Three:

h. Maximum term of imprisonment: 10 years.

i. Mandatory minimum term of imprisonment: None.

j. Term of supervised release: 3 year(s) to 5 years.

k. Maximum fine: $250,000.00, due and payable immediately.

l. Full restitution, due and payable immediately, to all victims of the offense(s) and relevant conduct.

m. Mandatory special assessment: $100.00, due and payable immediately.

n. Forfeiture of any and all proceeds from the commission of the offense, any and all property used or intended to be used to facilitate the offense, and any property involved in the offense.

8. The Defendant understands that, before imposing sentence in this case, the Court will be required to consider, among other factors, the provisions of the United States Sentencing Guidelines and that, under certain circumstances, the Court has the discretion to depart from those Guidelines. The Defendant further understands that the Court may impose a sentence up to and including the statutory maximum as set forth in this paragraph and that no one can predict his exact sentence at this time.

IV. PLEA AGREEMENT

9. The Defendant, his counsel, and the Government, subject to approval by the Court, have agreed upon a negotiated plea in this case, the terms of which are as follows:

Binding Sentencing Recommendation to the Court

10. This plea is entered under the specific provisions of Rule 11(c)(1)(C) of the Federal Rules of Criminal Procedure (Fed. R. Cr. P.). As a product of negotiations between the parties and in exchange for the government dismissing otherwise provable counts against the Defendant, the Defendant and the Government expressly recommend that the Court should impose a sentence of 180 months of imprisonment as the appropriate custodial sentence in this case. Under the provisions of Fed. R. Cr. P. 11(c)(1)(C), this recommendation would bind the Court to impose this particular custodial sentence if the Court accepts this plea agreement.

Dismissal of Counts

11. The Government agrees that, upon the entry of the Judgment and Commitment Order, any and all remaining counts in the above-styled case still pending against Defendant shall be dismissed pursuant to Standing Order No. 07-04 of this Court and to Rule 48(a) of the Federal Rules of Criminal Procedure. The Defendant understands that the Probation Office and the Court may still consider the conduct underlying such dismissed counts in determining relevant conduct under the Sentencing Guidelines and a reasonable sentence under Title 18, United States Code, Section 3553(a).

Section 851 Dismissal

12. The Government agrees that it will not pursue the applicable Title 21, Section 851 sentencing enhancements.

Sentencing Guidelines Recommendations

13. Based upon the evidence currently known to the Government, the Government agrees to make the following recommendations and/or to enter into the following stipulations.

Right to Answer Questions, Correct Misstatements, and Make Recommendations

14. The Government reserves the right to inform the Court and the Probation Office of all facts and circumstances regarding the Defendant and this case, and to respond to any questions from the Court and the Probation Office and to any misstatements of

fact or law. Except as expressly stated elsewhere in this Plea Agreement, the Government also reserves the right to make recommendations regarding application of the Sentencing Guidelines.

Right to Modify Recommendations

15. With regard to the Government's recommendation as to any specific application of the Sentencing Guidelines as set forth elsewhere in this Plea Agreement, the Defendant understands and agrees that, should the Government obtain or receive additional evidence concerning the facts underlying any such recommendation, the Government will bring that evidence to the attention of the Court and the Probation Office. In addition, if the additional evidence is sufficient to support a finding of a different application of the Guidelines, the Government will not be bound to make the recommendation set forth elsewhere in this Plea Agreement, and the failure to do so will not constitute a violation of this Plea Agreement.

Cooperation

General Requirements

16. The Defendant agrees to cooperate truthfully and completely with the Government, including being debriefed and providing truthful testimony at any proceeding resulting from or related to Defendant's cooperation. Defendant agrees to so cooperate in any investigation or proceeding as requested by the Government. Defendant agrees that

Defendant's cooperation shall include, but not be limited to:

a. producing all records, whether written, recorded, electronic, or machine readable, in his actual or constructive possession, custody, or control, of evidentiary value or requested by attorneys and agents of the Government;

b. making himself available for interviews, not at the expense of the Government if he is on bond, upon the request of attorneys and agents of the Government;

c. responding fully and truthfully to all inquiries of the Government in connection with any investigation or proceeding, without falsely implicating any person or intentionally withholding any information, subject to the penalties of making false statements (18 U.S.C. § 1001), obstruction of justice (18 U.S.C. § 1503) and related offenses;

d. when called upon to do so by the Government in connection with any investigation or proceeding, testifying in grand jury, trial, and other judicial proceedings, fully, truthfully, and under oath, subject to the penalties of perjury (18 U.S.C. § 1621), making

false statements or declarations in grand jury or court proceedings (18 U.S.C. § 1623), contempt (18 U.S.C. §§ 401 - 402), obstruction of justice (18 U.S.C. § 1503), and related offenses.

The Defendant understands that the Government alone will determine what forms of cooperation to request from the Defendant, and the Defendant agrees that Defendant will not engage in any investigation that is not specifically authorized by the Government.

Section 1B1.8 Protection

17. Pursuant to Section 1B1.8 of the Sentencing Guidelines, the Government agrees that any self-incriminating information that was previously unknown to the Government and is provided to the Government by the Defendant in connection with Defendant's cooperation and as a result of this Plea Agreement will not be used in determining the applicable sentencing guideline range, although such information may be disclosed to the Probation Office and the Court. The Government also agrees not to bring additional charges against the Defendant, with the exception of charges resulting from or related to violent criminal activity, based on any information provided by the Defendant in connection with cooperation that was not known to the Government prior to the cooperation. However, if the Government determines that the Defendant has not been completely truthful and candid in his cooperation with the Government, he may be subject to prosecution for perjury, false statements,

obstruction of justice, and any other appropriate charge, and all information Defendant has provided may be used against Defendant in such a prosecution. Furthermore, should the Defendant withdraw his guilty plea in this case and proceed to trial, the Government is free to use any statements and/or other information provided by the Defendant, pursuant to the Defendant's cooperation, as well as any information derived therefrom, during any trial or other proceeding related to the Government's prosecution of the Defendant for the offense(s) charged in the above-numbered Counts One and Three.

Sentencing Recommendations

Specific Sentence Recommendation

18. The parties agree that the Defendant should be sentenced to 180 months.

Defendant Unable to Pay Fine

19. Based on the information currently available to it, the Government agrees to recommend that the Defendant does not have the financial resources to pay a fine.

Forfeiture

20. The Defendant acknowledges that each asset listed below is subject to forfeiture and agrees that he shall immediately forfeit to the United States any proceeds from, property used or intended to be used to facilitate, and property involved in the

commission of the offenses in Counts One and Three, including, but not limited to, the following:

a. $14,124.00 in United States currency seized on or about April 19, 2013;

b. The Smith and Wesson .357 caliber pistol with obliterated serial number referenced in Count Three of the Indictment; and

c. $36,970.00 in United States currency seized on or about April 17, 2013, from Joshua Wayne Andrews;

21. The Defendant waives and abandons all right, title, and interest in the all of the property listed above (referred to hereafter, collectively, as the Subject Property) and agrees to the administrative or judicial forfeiture of the Subject Property. In addition, the Defendant waives and abandons his interest in any other property that may have been seized in connection with this case. The Defendant agrees to the administrative or judicial forfeiture or the abandonment of any seized property.

22. The Defendant states that he is the sole and rightful owner of the $14,124.00 in United States currency and the Smith and Wesson .357 caliber pistol, that to the best of his knowledge no other person or entity has any interest in those two items, and that he has not transferred, conveyed, or encumbered his interest in them. The Defendant agrees to take all steps requested by the United States to facilitate transfer of title of the Subject

Property, including providing and endorsing title certificates, or causing others to do the same where third parties hold nominal title on the Defendant's behalf, to a person designated by the United States. The Defendant agrees to take all steps necessary to ensure that the Subject Property is not hidden, sold, wasted, destroyed, or otherwise made unavailable for forfeiture. The Defendant agrees not to file any claim, answer, or petition for remission or restitution in any administrative or judicial proceeding pertaining to the Subject Property, and if such a document has already been filed, the Defendant hereby withdraws that filing.

23. The Defendant agrees to hold the United States and its agents and employees harmless from any claims made in connection with the seizure, forfeiture, or disposal of property connected to this case. The Defendant acknowledges that the United States will dispose of any seized property, and that such disposal may include, but is not limited to, the sale, release, or destruction of any seized property, including the Subject Property. The Defendant agrees to waive any and all constitutional, statutory, and equitable challenges in any manner (including direct appeal, a Section 2255 petition, habeas corpus, or any other means) to the seizure, forfeiture, and disposal of any property seized in this case, including the Subject Property, on any grounds.

24. The Defendant consents to the Court's entry of a preliminary order of forfeiture against the Subject Property, which will be final as to him, a part of his sentence, and incorporated into the judgment against him.

Financial Cooperation Provisions

Special Assessment

25. The Defendant understands that the Court will order him to pay a special assessment in the amount of $200.

Fine/Restitution—Terms of Payment

26. The Defendant agrees to pay any fine and/or restitution imposed by the Court to the Clerk of Court for eventual disbursement to the appropriate account and/or victim(s). The Defendant also agrees that the full fine and/or restitution amount shall be considered due and payable immediately. If the Defendant cannot pay the full amount immediately and is placed in custody or under the supervision of the Probation Office at any time, he agrees that the custodial agency and the Probation Office will have the authority to establish payment schedules to ensure payment of the fine and/or restitution. The Defendant understands that this payment schedule represents a minimum obligation and that, should Defendant's financial situation establish that he is able to pay more toward the fine and/or restitution, the Government is entitled to pursue other sources of recovery of the fine and/or restitution. The Defendant further agrees to cooperate fully in efforts to collect the fine and/or restitution obligation by any legal means the Government deems appropriate. Finally, the Defendant and his counsel agree that the Government may contact the Defendant regarding the collection of any fine and/or restitution without notifying and outside the presence of his counsel.

Financial Disclosure

27. The Defendant agrees that Defendant will not sell, hide, waste, encumber, destroy, or otherwise devalue any such asset worth more than $500 before sentencing, without the prior approval of the Government. The Defendant understands and agrees that Defendant's failure to comply with this provision of the Plea Agreement should result in Defendant receiving no credit for acceptance of responsibility.

28. The Defendant agrees to cooperate fully in the investigation of the amount of restitution and fine; the identification of funds and assets in which he has any legal or equitable interest to be applied toward restitution and/or fine; and the prompt payment of restitution or a fine.

Limited Waiver of Appeal

29. LIMITED WAIVER OF APPEAL: To the maximum extent permitted by federal law, the Defendant voluntarily and expressly waives the right to appeal his conviction and sentence and the right to collaterally attack his conviction and sentence in any post-conviction proceeding (including, but not limited to, motions filed pursuant to 28 U.S.C. § 2255) on any ground, except that the Defendant may file a direct appeal of an upward departure or variance above the sentencing guideline range as calculated by the district court. The Defendant understands that this Plea Agreement does not limit the Government's right to appeal, but if the Government initiates a direct appeal of the sentence imposed, the Defendant may file a cross-appeal of that same sentence.

privacy protections to permit the Government to access his credit report and tax information held by the Internal Revenue Service.

30. So long as the Defendant is completely truthful, the Government agrees that anything related by the Defendant during his financial interview or deposition or in the financial forms described above cannot and will not be used against him in the Government's criminal prosecution. However, the Government may use the Defendant's statements to identify and to execute upon assets to be applied to the fine and/or restitution in this case. Further, the Government is completely free to pursue any and all investigative leads derived in any way from the interview(s)/deposition(s)/financial forms, which could result in the acquisition of evidence admissible against the Defendant in subsequent proceedings. If the Defendant subsequently takes a position in any legal proceeding that is inconsistent with the interview(s)/deposition(s)/financial forms-whether in pleadings, oral argument, witness testimony, documentary evidence, questioning of witnesses, or any other manner—the Government may use the Defendant's interview(s)/deposition(s)/ financial forms, and all evidence obtained directly or indirectly therefrom, in any responsive pleading and argument and for cross-examination, impeachment, or rebuttal evidence. Further, the Government may also use the Defendant's interview(s)/deposition(s)/ financial forms to respond to arguments made or issues raised sua sponte by the Magistrate or District Court.

Limited Waiver of Appeal

31. LIMITED WAIVER OF APPEAL: To the maximum extent permitted by federal law, the Defendant voluntarily and expressly waives the right to appeal his conviction and sentence and the right to collaterally attack his conviction and sentence in any post-conviction proceeding (including, but not limited to, motions filed pursuant to 28 U.S.C. § 2255) on any ground, except that the Defendant may file a direct appeal of an upward departure or variance above the sentencing guideline range as calculated by the district court. The Defendant understands that this Plea Agreement does not limit the Government's right to appeal, but if the Government initiates a direct appeal of the sentence imposed, the Defendant may file a cross-appeal of that same sentence.

Miscellaneous Waivers

FOIA/Privacy Act Waiver

32. The Defendant hereby waives all rights, whether asserted directly or by a representative, to request or receive from any department or agency of the United States any records pertaining to the investigation or prosecution of this case, including, without limitation, any records that may be sought under the Freedom of Information Act, Title 5, United States Code, Section 552, or the Privacy Act of 1974, Title 5, United States Code, Section 552a.

Section 851 Dismissal & Waiver of Right to Challenge Prior Convictions

33. In consideration of the benefits received by Defendant under the terms of this Plea Agreement, including, but not limited to, the dismissal of the Section 851 sentencing enhancement Information, Defendant agrees that he will not challenge, either directly or collaterally, in any manner, any prior sentence and/or conviction in any court. Defendant further agrees that, in the event that a prior sentence or conviction is vacated, this event will not serve as the basis for a reduced sentence in any collateral attack on the sentence in this case.

No Other Agreements

34. There are no other agreements, promises, representations, or understandings between the Defendant and the Government.

In Open Court this 19th day of December, 2013.

/s/ Brian Mendelsohn	/s/ Erik Hughes
SIGNATURE (Attorney for Defendant)	SIGNATURE (Defendant)
Brian Mendelsohn	ERIK HUGHES
/s/ Angela Marie Garland	
SIGNATURE (Assistant U.S. Attorney)	
Angela Marie Garland	

/s/ Katherine M. Hoffer
SIGNATURE
(Approving Official)

I have read the Indictment against me and have discussed it with my attorney. I understand the charges and the elements of each charge that the Government would have to prove to convict me at a trial. I have read the foregoing Plea Agreement and have carefully reviewed every part of it with my attorney. I understand the terms and conditions contained in the Plea Agreement, and I voluntarily agree to them. I also have discussed with my attorney the rights I may have to appeal or challenge my conviction and sentence, and I understand that the appeal waiver contained in the Plea Agreement will prevent me, with the narrow exceptions stated, from appealing my conviction and sentence or challenging my conviction and sentence in any post-conviction proceeding. No one has threatened or forced me to plead guilty, and no promises or inducements have been made to me other than those discussed in the Plea Agreement. The discussions between my attorney and the Government toward reaching a negotiated plea in this case took place with my permission. I am fully satisfied with the representation provided to me by my attorney in this case.

/s/ Erik Hughes	12/19/13
SIGNATURE	DATE
(Defendant)	
ERIK HUGHES	

I am ERIK HUGHES's lawyer. I have carefully reviewed the charges and the Plea Agreement with my client. To my knowledge, my client is making an informed and voluntary decision to plead guilty and to enter into the Plea Agreement.

/s/ Brian Mendelsohn — 12/19/13
SIGNATURE (Defense Attorney) — DATE
Brian Mendelsohn

Brian Mendelsohn
Federal Defender
Program

Centennial Tower

101 Marietta Street,
N.W.,

Suite 1500
Atlanta, GA 30303
(404)688-7530

_____ State Bar of Georgia Number

ERIK HUGHES
USMS

Filed in Open Court

This _ day of __, 20__

By _____

FILED IN OPEN COURT
James N. Hatten, Clerk

By:

Deputy Clerk

U. S. DEPARTMENT OF JUSTICE

Statement of Special Assessment Account

This statement reflects your special assessment only. There may be other penalties imposed at sentencing.

ACCOUNT INFORMATION	
CRIMINAL ACTION NO.:	4:13-CR-43-HLM-WEJ
DEFENDANT'S NAME:	ERIK HUGHES
PAY THIS AMOUNT:	$200

Instructions:

1. Payment must be made by **certified check** or **money order** payable to:

Clerk of court, U.S. District Court
personal checks will not be accepted

2. Payment must reach the clerk's office within 30 days of the entry of your guilty plea

3. Payment should be sent or hand delivered to:

Clerk, U.S. District Court
600 East First Street
Rome, Georgia 30161
(Do Not Send Cash)

4. Include defendant's name on **certified check** or **money order**.

5. Enclose this coupon to insure proper and prompt application of payment.

6. Provide proof of payment to the above-signed AUSA within 30 days of the guilty plea.

APPENDIX E

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA

UNITED STATES OF AMERICA, Plaintiff, vs. ERIK HUGHES #65026-019, Defendant. _____/	CASE NO. 4:13-CR-43-01-HLM **FILED IN CLERK'S OFFICE** U.S.D.C. Rome JUN 15 2015 JAMES N. HATTEN, Clerk By: Deputy Clerk

DEFENDANT'S MOTION FOR REDUCTION OF SENTENCE
Pursuant to 18 U.S.C. § 3582(c)(2)

TO THE HONORABLE COURT:

COMES NOW, the Defendant, Erik Hughes, appearing this day pro se and without the aid of counsel, who respectfully moves this Honorable Court for a reduction of his current sentence of 180 months, pursuant to 18 U.S.C. § 3582(c)(2), following Amendment 782 to the United States Sentencing Guidelines, and states:

BACKGROUND

On or about December 19, 2013, Defendant pled guilty to Counts One and Three of a four count indictment, charging, conspiracy to possess with intent to distribute 500 grams or more of methamphetamine, in violation of 21 U.S.C. § 841(b)(1)(A)(viii) & § 846(Count One); possessing with intent to distribute 50 grams or more of methamphetamine, in violation of 21 U.S.C. § 841(a)(1), § 841(b)(1)(B)(viii) and § 846 (Count Two); possessing a firearm after having been convicted of a felony, in violation of 18 U.S.C. § 922(g)(1) (Count Three); and possessing a firearm having an obliterated serial number, in violation of 18 U.S.C. § 922(k) (Count Four). See Plea Agreement at (Doc. 54).

Defendant appeared before this Honorable Court for sentencing, on or about March 3, 2014, at which time this Honorable Court sentenced Defendant to a term of 180 months imprisonment, to be followed by a term of 5 years supervised release. See Judgment at (Doc. 69).

Defendant did not file a Notice of Appeal, nor pursue a direct appeal from his judgment of conviction, however, brings the instant motion for a reduction of his sentence, pursuant to 18 U.S.C. § 3582(c)(2), following Amendment 782 to the U.S. Sentencing Guidelines.

REASONS FOR REDUCING SENTENCE UNDER AMENDMENT 782

Defendant maintains, as an initial matter, that he is entitled to a reduction of his sentence under Amendment 782 because his sentence was based on a sentencing range which was later reduced by the Sentencing Commission, particularly, via Amendment 782.

Specifically, in *United States v. Dews*, 551 F.3d 204 (4th Cir. 2008), the Fourth Circuit held that a court could modify a defendant's sentence pursuant to a Rule 11(c)(1)(C) agreement. There, the court stated that "a sentence may be both a guideline-based sentence eligible for treatment under § 3582(c)(2) and a sentence stipulated to by the parties in a plea agreement. *See Dews* at 209.

Other courts have adopted a fact-specific, case-by-case approach to determining whether Rule 11(c)(1)(C) plea agreements are based on the Guidelines. *See, e.g., United States v. Franklin*, 600 F.3d 893, 897 (7th Cir. 2010) (holding that defendants pleading guilty pursuant to Rule 11(c)(1)(C) agreements may be entitled to reductions under § 3582); *United States v. Cobb*, 584 F.#d 979, 985 (10th Cir. 2009) ("If we categorically removed Rule 11 pleas from the reach of § 3582, it would perpetuate the very disparity § 3582 and the retroactive application of Amendment 706 were meant to correct."); *United States v. Bride*, 581 F.3d 888, 891 (9th Cir. 2009) (stating that "the terms of the plea agreement are key to determining whether the defendant's sentence was, in fact, based on the

sentencing range that was later reduced by the Sentencing Commission").

In the instant case subjudice, it is obvious that Defendant's sentence was based on the Sentencing Guidelines. In plea discussions, it was discussed that Defendant's Guideline range was 188-235 months. Agreeing to a term of imprisonment as close to the bottom of the Guidelines possible, the parties reached an agreement that Defendant would plead guilty under Rule 11(c)(1)(C) and the Government would agree to a sentence of 180 months imprisonment, 8 months below the bottom of Defendant's otherwise applicable Guideline range.

Although the Government also dismissed Counts Two and Four pursuant to the Rule 11(c)(1)(C) agreement, such dismissal of those two miscellaneous counts did nothing to lower the potential sentence faced by Defendant without the Rule 11(c)(1)(C) agreement. In fact, the counts that Defendant pleaded guilty to, Counts One and Three, were the most severe counts, and Count One would have been the Count to have determined the potential sentence faced even with a plea to all four counts.

Likewise, the Government's agreement not to seek an enhancement under 21 U.S.C. § 851 if Defendant pled guilty is also a normal practice of the Government, recently rejected as retaliatory and unconstitutional by the United States Attorney General, which also cannot be contributed as a significant balancing factor in concluding that Defendant's sentence was based on the Sentencing Guidelines.

In essence, if Defendant would have pleaded guilty, even without the Rule 11(c)(1)(C) agreement, his sentencing range would have been 188-235 months imprisonment, potentially 8 months more than the term agreed upon pursuant to Rule 11(c)(1)(C). Wherefore, based on this calculus, it is unequivocal that the parties agreement to a sentence of 180 months imprisonment was based on the Sentencing Guidelines, and the sentencing range anticipated by the Sentencing Guidelines.

This is so because the policy statement accompanying § 3582(c)(2) states that "[i]f the original term of imprisonment imposed was less than the term of imprisonment provided by the guidelines range applicable to the defendant at the time of sentence (8 months in this case), a reduction comparably less than the amended guidelines range (151-188 months in this case) ... may be appropriate. Although a comparable reduction of 8 months would constitute an amended Rule 11(c)(1)(C) sentence of 143 months, Defendant conservatively maintains that a reduction to 150 months, the lesser tenth, would sufficiently uphold the terms of the Rule 11(c)(1)(C) agreement underlying. *See Appendix A hereto.*

CONCLUSION

Wherefore, for all of the foregoing reasons, Defendant prays this Honorable Court grant the relief sought herein, and reduce Defendant's sentence to a term of 150 months, which would constitute 1 month less than the otherwise applicable Guidelines range.

Dated: June 8, 2015

Respectfully Submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served upon Assistant U.S. Attorney Angela Marie Garland, at the Office of the U.S. Attorney, Northern District of Georgia, Rome Division, by U.S. Mail, this 7th day of June 2015.

Respectfully Certified,
/s/ Erik Hughes
Erik Hughes #65026-019
Defendant, pro se

RECORD AND BRIEFS

Supreme Court, FILED
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No. 17-155

In the Supreme Court of the United States

ERIK LINDSEY HUGHES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether, under *Freeman* v. *United States*, 564 U.S. 522 (2011), petitioner is eligible for a sentence reduction pursuant to 18 U.S.C. 3582(c)(2) based on a retroactive amendment to the Sentencing Guidelines, when petitioner was sentenced after entering into a binding Federal Rule of Criminal Procedure 11(c)(1)(C) plea agreement that required a specific sentence that is not expressly tied to the Guidelines.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 1
Argument 9
Conclusion 19

TABLE OF AUTHORITIES

Cases:

Blaine v. *United States*, 137 S. Ct. 1329 (2017) 9
Brown v. *United States*, 565 U.S. 1148 (2012) 9
Chapman v. *United States*, 137 S. Ct. 625 (2017) 9
Dillon v. *United States*, 560 U.S. 817 (2010) 2, 15, 17
Freeman v. *United States*, 564 U.S. 522 (2011) ..... *passim*
Fuentes v. *United States*, 137 S. Ct. 627 (2017) 9
Gilmore v. *United States*, 137 S. Ct. 2264 (2017) 9
Graham v. *Florida*, 560 U.S. 48 (2010) 11
Grutter v. *Bollinger*, 539 U.S. 306 (2003) 16
Marks v. *United States*, 430 U.S. 188 (1977) 8, 9, 10, 11
McNeese v. *United States*, 137 S. Ct. 474 (2016) 9
Negrón v. *United States*, 137 S. Ct. 2293 (2017) 9
Nichols v. *United States*, 511 U.S. 738 (1994) 10, 16
Pleasant v. *United States*, 134 S. Ct. 824 (2013) 9
Romano v. *Oklahoma*, 512 U.S. 1 (1994) 11
Sullivan v. *United States*, 137 S. Ct. 2263 (2017) 9
United States v. *Benitez*, 822 F.3d 807 (5th Cir. 2016) 12
United States v. *Brown*, 653 F.3d 337 (4th Cir. 2011), cert. denied, 568 U.S. 1148 (2012) 11, 12

Cases—Continued: Page

United States v. *Browne*, 698 F.3d 1042 (8th Cir. 2012), cert. denied, 568 U.S. 1242 (2013) 12
United States v. *Davis*, 825 F.3d 1014 (9th Cir. 2016) 12, 13
United States v. *Dixon*, 687 F.3d 356 (7th Cir. 2012) 12, 16
United States v. *Duvall*:
705 F.3d 479 (D.C. Cir. 2013) 14
740 F.3d 604 (D.C. Cir. 2013) 10, 11, 13, 16
United States v. *Epps*, 707 F.3d 337 (D.C. Cir. 2013) 12, 13
United States v. *Garrett*, 758 F.3d 749 (6th Cir. 2014) 12
United States v. *Graham*, 704 F.3d 1275 (10th Cir. 2013) 12
United States v. *Leonard*, 844 F.3d 102 (2d Cir. 2016) 12
United States v. *Negrón*, 837 F.3d 91 (1st Cir. 2016), cert. denied, 137 S. Ct. 2293 (2017) 12
United States v. *Rivera-Martínez*, 665 F.3d 344 (1st Cir. 2011), cert. denied, 568 U.S. 860 (2012) 11
United States v. *Weatherspoon*, 696 F.3d 416 (3d Cir. 2012), cert. denied, 568 U.S. 1188 (2013) 12
United States v. *White*, 429 Fed. Appx. 43 (2d Cir. 2011) 12

Statutes, guidelines, and rules:

18 U.S.C. 922(g)(1) 2, 4
18 U.S.C. 922(k) 18
18 U.S.C. 3553(a) 6, 15
18 U.S.C. 3582(c) 2, 15, 17, 18
18 U.S.C. 3582(c)(2) ..... *passim*
21 U.S.C. 841(a) 18
21 U.S.C. 841(b)(1)(A) 18
21 U.S.C. 841(b)(1)(A)(viii) 2, 4

Statutes, guidelines, and rules—Continued: Page

21 U.S.C. 841(b)(1)(B)(viii) 18
21 U.S.C. 846 ..... 2, 4
21 U.S.C. 851 ..... 5, 18
United States Sentencing Guidelines:
§ 1B1.10(b) 15
§ 2D1.1(b)(1) 6
§ 2D1.1(c)(3) 5
§ 3E1.1(a) 6
App. C Supp., Amend. 782 (Nov. 1, 2014) 7, 17
App. C Supp., Amend. 788 (Nov. 1, 2014) 7, 17
Fed. R. Crim. P.:
Rule 11(c)(1) 15
Rule 11(c)(1)(A) 14
Rule 11(c)(1)(B) 14
Rule 11(c)(1)(C) ..... *passim*

In the Supreme Court of the United States

No. 17-155

ERIK LINDSEY HUGHES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 849 F.3d 1008. The order of the district court (Pet. App. 16a-30a) is not published in the Federal Supplement but is available at 2015 WL 13344902.

JURISDICTION

The judgment of the court of appeals was entered on February 27, 2017. On May 22, 2017, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including July 27, 2017, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Northern District of Georgia, petitioner was convicted of conspiracy to possess with intent to distribute at least 500 grams of methamphetamine, in

violation of 21 U.S.C. 841(b)(1)(A)(viii) and 846, and possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1). Pet. App. 3a, 16a-17a. He was sentenced to 180 months of imprisonment, to be followed by five years of supervised release. *Id.* at 17a. Petitioner later moved for a sentencing reduction under 18 U.S.C. 3582(c)(2), which the district court denied. Pet. App. 16a-30a. The court of appeals affirmed. *Id.* at 1a-15a.

1. A district court generally "may not modify a term of imprisonment once it has been imposed." 18 U.S.C. 3582(c); see *Dillon* v. *United States*, 560 U.S. 817, 819 (2010). A modification may be permissible, however, "in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. 994(*o*)." 18 U.S.C. 3582(c)(2). If a defendant meets that requirement, the district court "may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission." *Ibid.*

Federal Rule of Criminal Procedure 11(c)(1)(C) provides that the defendant and the government may agree in a plea agreement on "a specific sentence" as "the appropriate disposition of the case" and that "such a recommendation or request binds the court once the court accepts the plea agreement." Fed. R. Crim. P. 11(c)(1)(C). In *Freeman* v. *United States*, 564 U.S. 522 (2011), this Court addressed "whether defendants who enter into [Rule 11(c)(1)(C)] plea agreements that recommend a particular sentence as a condition of the guilty plea may be eligible for relief under § 3582(c)(2)" in light of that provision's requirement that the original

sentence have been "based on" the Sentencing Guidelines. *Id.* at 525 (plurality opinion).

Freeman did not produce a majority opinion. A plurality of four Justices concluded that a "district judge's decision to impose a sentence" may be "based on the Guidelines even if the defendant agrees to plead guilty under Rule 11(c)(1)(C)," because the district judge must consider the Guidelines and calculate the defendant's relevant Guidelines range when deciding whether to accept the plea agreement. 564 U.S. at 526; see *id.* at 529-534. According to the plurality, "[Section] 3582(c)(2) modification proceedings should be available to permit the district court to revisit a prior sentence to whatever extent the sentencing range in question was a relevant part of the analytic framework the judge used to determine the sentence or to approve the agreement." *Id.* at 530.

Concurring in the judgment, Justice Sotomayor adopted what the plurality referred to as "an intermediate position" between the plurality and the dissent. *Freeman*, 564 U.S. at 532. Justice Sotomayor concluded that a sentence imposed pursuant to a Rule 11(c)(1)(C) agreement generally will be "based on" the agreement itself, not on the district court's Guidelines calculations, because such an agreement is binding once accepted and, "[a]t the moment of sentencing, the court simply implements the terms of the agreement it has already accepted." *Id.* at 535-536. That is so even though "the parties to a [Rule 11(c)(1)(C)] agreement may have considered the Guidelines in the course of their negotiations." *Id.* at 537; see *id.* at 538 (rejecting argument that courts must "engage in a free-ranging search through the parties' negotiating history in search of a Guidelines sentencing range that might have been relevant to the agreement or the court's acceptance of it").

Justice Sotomayor further concluded, however, that "if a [Rule 11(c)(1)(C)] agreement expressly uses a Guidelines sentencing range applicable to the charged offense to establish the term of imprisonment, and that range is subsequently lowered by the United States Sentencing Commission, the term of imprisonment is 'based on' the range employed and the defendant is eligible for sentence reduction under § 3582(c)(2)." *Id.* at 534; accord *id.* at 536-540. In finding that standard met in Freeman's case, Justice Sotomayor noted that the plea agreement expressly stated that Freeman "agrees to have his sentence determined pursuant to the Sentencing Guidelines" and that the "agreement employed * * * the bottom end" of the applicable Guidelines range. *Id.* at 542 (citation omitted).

Chief Justice Roberts, writing for himself and three other Justices, dissented, concluding that a defendant who pleads guilty in exchange for a specific sentence pursuant to a Rule 11(c)(1)(C) agreement is never eligible for a sentence reduction under Section 3582(c)(2). The dissent reasoned that the sentence of a defendant who enters a Rule 11(c)(1)(C) agreement is always "based on" the agreement. *Freeman*, 564 U.S. at 544-546.

2. Petitioner was a member of a methamphetamine trafficking ring in Georgia. Presentence Investigation Report (PSR) ¶¶ 12-13. In December 2013, petitioner pleaded guilty pursuant to a Rule 11(c)(1)(C) plea agreement to one count of conspiracy to possess with intent to distribute at least 500 grams of methamphetamine, in violation of 21 U.S.C. 841(b)(1)(A)(viii) and 846, and one count of possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1). Pet. App. 17a, 50a-70a. The plea agreement stated that petitioner faced a stat-

utory sentencing range of ten years to life on the conspiracy count and zero to ten years on the firearms count. *Id.* at 52a-53a. The plea agreement further stated that, before the court imposes a sentence, it "will be required to consider, among other factors, the provisions of the United States Sentencing Guidelines and that, under certain circumstances, the Court has the discretion to depart from those Guidelines. *Id.* at 54a. The agreement stated that petitioner "understands that the Court may impose a sentence up to and including the statutory maximum * * * and that no one can predict his exact sentence at this time." *Ibid.*

The plea agreement explained, however, that the plea was "entered under the specific provisions of Rule 11(c)(1)(C)" and that "[a]s a product of negotiations between the parties and in exchange for the government dismissing" two other counts, petitioner and the government "expressly recommend that the Court should impose a sentence of 180 months of imprisonment as the appropriate custodial sentence in this case." Pet. App. 54a; see *id.* at 59a ("The parties agree that [petitioner] should be sentenced to 180 months."); see also *id.* at 55a (government also agreed not to seek a recidivist enhancement under 21 U.S.C. 851). "Under the provisions of" Rule 11(c)(1)(C), the agreement continued, "this recommendation would bind the Court to impose this particular custodial sentence if the Court accepts this plea agreement." *Id.* at 54a.

In advance of sentencing, the Probation Office prepared a PSR, which applied the 2013 Guidelines. PSR ¶ 29. The PSR stated that petitioner was responsible for 257.2 grams of methamphetamine, which resulted in a base offense level of 34. PSR ¶ 31 (citing Sentencing Guidelines § 2D1.1(c)(3)). After applying a three-level

reduction for acceptance of responsibility, the PSR calculated a total offense level of 31. PSR ¶¶ 37-38 (citing Sentencing Guidelines § 3E1.1(a)). Combining the total offense level with petitioner's criminal history category VI yielded an advisory Guidelines sentencing range of 188 to 235 months of imprisonment. PSR ¶ 56; Pet. App. 36a.[1]

At sentencing, the district court calculated the same advisory Guidelines range of 188 to 235 months of imprisonment. Pet. App. 36a. Petitioner "ask[ed] the Court to accept the binding plea," *id.* at 42a, and the government recommended the same, noting that petitioner was otherwise "facing life without parole with his prior convictions and the kind of drug quantities that were involved here," *ibid.* Consistent with the parties' request, the court accepted the plea agreement and sentenced petitioner to the agreed-upon sentence of 180 months of imprisonment. *Id.* at 44a.

In imposing sentence, the district court explained that it had reviewed the "binding" plea agreement, the PSR, the Sentencing Guidelines, and the factors set forth in 18 U.S.C. 3553(a). Pet. App. 32a-33a. The court concluded that the 180-month sentence was "reasonable"; serves the "best interest" of petitioner, the government, and society; and "complies * * * with the spirit of the * * * Sentencing Guidelines [and] with the principles of fairness and justness and specific provisions of Section 3553(a) and is a reasonable sentence without any unreasonable disparity between the sentence imposed in this case, pursuant to the binding plea

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[1] The PSR initially recommended a two-level firearms enhancement, but the district court declined to apply that enhancement. See Pet. App. 34a-35a; PSR ¶ 32 (citing Sentencing Guidelines § 2D1.1(b)(1)).

agreement, and sentences imposed upon other defendants with similar backgrounds and similar offenses." *Id.* at 33a. The court further noted that "the Government has acted very reasonably in connection with their recommendation in this case and defense counsel has acted very reasonably with his recommendation in this case as to what each lawyer believes to be a fair and reasonable sentence under the circumstances." *Id.* at 47a.

3. In 2014, the U.S. Sentencing Commission issued Amendment 782 to the Sentencing Guidelines which, when made retroactive by Amendment 788, had the effect of lowering the base offense level for a defendant like petitioner by two levels. See Pet. App. 3a-4a. On June 15, 2015, petitioner, proceeding pro se, invoked Amendment 782 and asked the district court to reduce his sentence under 18 U.S.C. 3582(c)(2). See Pet. App. 71a-76a. Petitioner did not cite *Freeman* or otherwise specifically address the implications of the agreement to a specific sentence in his Rule 11(c)(1)(C) plea agreement on his eligibility for Section 3582(c)(2) relief. See *ibid.*

The district court denied the motion. Pet. App. 16a-30a. The court reasoned that Justice Sotomayor's concurring opinion in *Freeman* was controlling, *id.* at 25a, and determined that, under Justice Sotomayor's framework, petitioner "is not entitled to relief under § 3582(c)(2) because his original sentence was not tied to the Sentencing Guidelines calculations," *id.* at 27a. The court observed that it "[wa]s abundantly clear that [petitioner's] sentence was not linked or tied to the Sentencing Guidelines. Indeed, the plea agreement does not mention an otherwise applicable Sentencing Guidelines range or [petitioner's] criminal history, and [his] criminal history category is not evident from the Agreement itself." *Id.* at 28a.

4. The court of appeals affirmed. Pet. App. 1a-15a.

The court of appeals, like the district court, determined that Justice Sotomayor's opinion in *Freeman* controls the analysis. Pet. App. 5a-14a. It explained, quoting *Marks* v. *United States*, 430 U.S. 188, 193 (1977), that "[w]hen a fragmented [Supreme] Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." Pet. App. 7a. Applying that rubric, the court found that "Justice Sotomayor's opinion in *Freeman* provides the narrowest ground of agreement because her concurring opinion establishes the least far-reaching rule." *Id.* at 8a (brackets and internal quotation marks omitted). The court reasoned that the *Freeman* plurality and Justice Sotomayor "agree on the broader principle that defendants sentenced based on a binding plea agreement can later have their sentences reduced under section 3582(c)(2), but the concurring opinion uses narrower reasoning than the plurality opinion." *Ibid.* "Whenever the concurring opinion would grant relief to a defendant sentenced according to a binding plea agreement, the plurality opinion would agree with the result because, under the logic of the plurality opinion, a defendant should always receive relief." *Ibid.*; see *id.* at 12a-13a. The court observed that its analysis was consistent with Eleventh Circuit precedent and with the holdings of eight other courts of appeals, but that two courts of appeals had reached a different conclusion. *Id.* at 8a-9a.

The court of appeals further determined, like the district court, that petitioner was ineligible for relief under Justice Sotomayor's framework. Pet. App. 14a-15a. It observed that petitioner's plea agreement did not call

for him to be sentenced within a particular Guidelines range and did not clearly indicate that the agreed-upon sentence of 180 months was tied to the Sentencing Guidelines. *Ibid.*

ARGUMENT

Petitioner contends (Pet. 10-34) that this Court's review is warranted to resolve a conflict about whether Justice Sotomayor's concurring opinion in *Freeman* v. *United States*, 564 U.S. 522 (2011), is controlling and to clarify how to apply the interpretive rubric in *Marks* v. *United States*, 430 U.S. 188 (1977), to decisions that lack a majority opinion. But the court of appeals correctly decided that Justice Sotomayor's concurring opinion in *Freeman* represents the "position taken by those Members who concurred in the judgment[] on the narrowest grounds," *id.* at 193 (citation omitted), and any disagreement on that issue is of limited significance. This Court has recently denied review in numerous cases raising the same question.[2] Further review is likewise not warranted here.[3]

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[2] See, *e.g.*, *Negrón* v. *United States*, 137 S. Ct. 2293 (2017) (No. 16-999); *Gilmore* v. *United States*, 137 S. Ct. 2264 (2017) (No. 16-7953); *Sullivan* v. *United States*, 137 S. Ct. 2263 (2017) (No. 16-7182); *Blaine* v. *United States*, 137 S. Ct. 1329 (2017) (No. 16-6574); *Fuentes* v. *United States*, 137 S. Ct. 627 (2017) (No. 16-6132); *Chapman* v. *United States*, 137 S. Ct. 625 (2017) (No. 16-5969); *McNeese* v. *United States*, 137 S. Ct. 474 (2016) (No. 16-66); *Pleasant* v. *United States*, 134 S. Ct. 824 (2013) (No. 13-6147); *Brown* v. *United States*, 565 U.S. 1148 (2012) (No. 11-6385).

[3] The petition does not seek review of the court of appeals' application to petitioner's case of the rule of decision set forth in Justice Sotomayor's concurring opinion in *Freeman*.

1. a. The general rule for ascertaining the holding of a case that lacks a majority opinion is that "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment[] on the narrowest grounds." *Marks*, 430 U.S. at 193 (citation omitted). In some cases, there may be no "'narrowest grounds' that represents the Court's holding," *Nichols* v. *United States*, 511 U.S. 738, 745 (1994), but *Freeman* is not such a case.

In *Freeman*, Justice Sotomayor took a narrower view than the plurality of when a Rule 11(c)(1)(C) defendant is eligible for a sentence reduction. The plurality stated that a defendant is eligible for Section 3582(c)(2) relief "to whatever extent the sentencing range in question was a relevant part of the analytic framework the judge used to determine the sentence or to approve the agreement," 564 U.S. at 530, but Justice Sotomayor concluded that eligibility exists only if the plea agreement tied the recommended sentence to the Guidelines range in express terms, *id.* at 534-535.

Under the plurality's standard, the district court invariably will use the Guidelines range in question to approve the agreement or to sentence the defendant where the agreement itself "expressly use[d]," *Freeman*, 564 U.S. at 534 (Sotomayor, J., concurring in the judgment), that range to arrive at the stipulated sentence. The opinion concurring in the judgment is therefore narrower than the plurality opinion and represents the controlling standard for Section 3582(c)(2) eligibility in cases involving a Rule 11(c)(1)(C) agreement. See *id.* at 532 (plurality opinion) (noting that Justice Sotomayor's concurring opinion reflects "an intermediate position"); see also, *e.g.*, *United States* v. *Duvall*, 740

F.3d 604, 612 (D.C. Cir. 2013) (Kavanaugh, J., concurring in the denial of rehearing en banc) (stating that the plurality in *Freeman* concluded that "sentences in cases with Rule 11(c)(1)(C) plea agreements are *always* 'based on' a Guidelines sentencing range," the dissenters "concluded that Rule 11(c)(1)(C) sentences are *never* based on a Guidelines sentencing range," and Justice Sotomayor "concluded that Rule 11(c)(1)(C) sentences are *sometimes* 'based on' a Guidelines sentencing range," and observing that "'sometimes' is a middle ground between 'always' and 'never'"); see generally *Graham* v. *Florida*, 560 U.S. 48, 59-60 (2010); *Romano* v. *Oklahoma*, 512 U.S. 1, 9 (1994); *Marks*, 430 U.S. at 193-194.

Put another way, a majority of the *Freeman* Court would agree with whatever result flowed from the application of Justice Sotomayor's concurring opinion. "[W]hen Justice Sotomayor concludes that a plea agreement was based on the Guidelines, she would agree with the result reached under [the plurality opinion]. When she concludes that a plea agreement was not based on the Guidelines, she would agree with the result reached under [the dissenting opinion]." *Duvall*, 740 F.3d at 612 (Kavanaugh, J., concurring in the denial of rehearing en banc); see, *e.g.*, *United States* v. *Rivera-Martínez*, 665 F.3d 344, 347-348 (1st Cir. 2011), cert. denied, 568 U.S. 860 (2012); *United States* v. *Brown*, 653 F.3d 337, 340 & n.1 (4th Cir. 2011), cert. denied, 565 U.S. 1148 (2012).

The dissent in *Freeman* acknowledged that the standard in Justice Sotomayor's opinion concurring in the judgment would be the one applied by courts going forward. 564 U.S. at 550-551 (Roberts, C.J., dissenting). And ten courts of appeals have concluded that Justice Sotomayor's opinion is controlling. See Pet. App.

5a-14a; *United States* v. *Negrón*, 837 F.3d 91, 94-95 & n.3 (1st Cir. 2016), cert. denied, 137 S. Ct. 2293 (2017); *United States* v. *Benitez*, 822 F.3d 807, 811 (5th Cir. 2016) (per curiam); *United States* v. *Garrett*, 758 F.3d 749, 757 (6th Cir. 2014); *United States* v. *Graham*, 704 F.3d 1275, 1278 (10th Cir. 2013); *United States* v. *Browne*, 698 F.3d 1042, 1045 (8th Cir. 2012), cert. denied, 568 U.S. 1242 (2013); *United States* v. *Dixon*, 687 F.3d 356, 359-360 (7th Cir. 2012); *United States* v. *Weatherspoon*, 696 F.3d 416, 422 (3d Cir. 2012), cert. denied, 568 U.S. 1188 (2013); *United States* v. *White*, 429 Fed. Appx. 43, 47 (2d Cir. 2011); *Brown*, 653 F.3d at 340 & n.1; see also *United States* v. *Leonard*, 844 F.3d 102, 108-109 (2d Cir. 2016) (acknowledging nonbinding Second Circuit precedent ruling that Justice Sotomayor's concurring opinion in *Freeman* controls, but finding that the result in the case before the court was the same under both the plurality and concurring opinions in *Freeman*).

b. Petitioner's reliance on decisions of the D.C. and Ninth Circuits adopting the approach taken in the *Freeman* plurality opinion is misplaced. See Pet. 17-18, 31-34 (citing *United States* v. *Davis*, 825 F.3d 1014 (9th Cir. 2016) (en banc), and *United States* v. *Epps*, 707 F.3d 337 (D.C. Cir. 2013)). Those courts concluded that they were free to adopt that approach on the ground that "there is no controlling opinion in *Freeman*" because no rationale was common to a majority of the Justices. *Epps*, 707 F.3d at 350; see *Davis*, 825 F.3d at 1016. In a few scenarios, the courts asserted, a defendant would prevail under Justice Sotomayor's approach but not under the plurality's, and thus the plurality's opinion is in some respects the narrower one. See *Davis*, 825 F.3d at 1016, 1023-1024; *Epps*, 707 F.3d at 350-352.

That conclusion is incorrect. "[I]n splintered cases, there are multiple opinions precisely *because* the Justices did not agree on a common rationale." *Duvall*, 740 F.3d at 613 (Kavanaugh, J., concurring in the denial of rehearing en banc). And no scenario exists under which a defendant could prevail under Justice Sotomayor's approach but the plurality would disagree. For instance, if a sentencing court considers and rejects a stipulated Guidelines range in a plea agreement on policy grounds but nevertheless imposes the agreed sentence—one of the scenarios on which *Epps* and *Davis* relied, see *Epps*, 707 F.3d at 350 n.8; see also *Davis*, 825 F.3d at 1023-1024—then Section 3582(c)(2) relief would be available under both the plurality opinion in *Freeman* and under Justice Sotomayor's concurring opinion, because the plea agreement expressly contemplated a Guidelines range and the judge expressly used the Guidelines range as the starting point for determining what sentence to impose. See *Freeman*, 564 U.S. at 529 (plurality opinion) ("Even where the judge varies from the recommended range, * * * if the judge uses the sentencing range as the beginning point to explain the decision to deviate from it, then the Guidelines are in a real sense a basis for the sentence."); *id.* at 539 (Sotomayor, J., concurring in the judgment); see also *Davis*, 825 F.3d at 1037-1038 (Bea, J., dissenting); *Duvall*, 740 F.3d at 614-615 (Kavanaugh, J., concurring in the denial of rehearing en banc). For similar reasons, petitioner errs in suggesting (Pet. 32-33) that the *Freeman* plurality would not allow for a sentence reduction in a hypothetical scenario in which the parties' agreement references an incorrect guidelines range, the district court calculates the correct one, but deviates from it to accept the plea agreement.

c. In any event, disagreement in the courts of appeals about the application of *Freeman* is of limited significance and does not warrant this Court's review. Which of the *Freeman* opinions controls is "likely to be a relatively short-lived issue for the courts," because plea agreements can—as Justice Sotomayor's *Freeman* opinion suggested—be drafted to avoid any controversies about whether the sentence set forth in such an agreement is "based upon" the Guidelines. *United States* v. *Duvall*, 705 F.3d 479, 484 & n.2 (D.C. Cir. 2013); see *id.* at 484 n.2 ("At oral argument, the Assistant U.S. Attorney indicated that the U.S. Attorney's Office now drafts Rule 11(c)(1)(C) plea agreements with an eye to avoiding later litigation on the *Freeman* issue. Doing so is consistent with Justice Sotomayor's suggestion.") (citing *Freeman*, 564 U.S. at 541-542 (Sotomayor, J., concurring in the judgment)).

Petitioner's suggestion (Pet. 25-26) that plea agreements cannot be drafted to avoid such controversies is mistaken. Prosecutors and defense lawyers entering into plea negotiations can fairly be presumed to know the governing legal rule in their circuit. As such, the parties can contract around any potential *Freeman* issues by, for example, entering into a Rule 11(c)(1)(A) or (B) agreement; making clear in the plea agreement that the agreed-upon sentence is (or is not) "based on" a Guidelines calculation; or agreeing that the defendant will, as a condition of pleading guilty, waive the right to seek Section 3582(c)(2) relief. See *Freeman*, 564 U.S. at 541 (Sotomayor, J., concurring in the judgment). Although the parties did not utilize any of those measures in the plea agreement here, their availability illustrates

that any choice between the two approaches lacks sufficient prospective significance to warrant this Court's intervention.

Indeed, even where the plea agreement in question predates such drafting improvements or, for whatever reason, does not employ them, the difference between the approach taken by the plurality and the approach taken by Justice Sotomayor matters in only a small subset of cases: those in which the district court accepts a Rule 11(c)(1) plea agreement that contains a binding sentence, the agreement fails to mention the Guidelines as a basis for the sentence but the district court relies on the Guidelines as part of its analytical framework, the Sentencing Commission subsequently lowers the relevant sentencing range retroactively while the defendant is still serving the sentence, a motion for Section 3582(c) relief is made, the Commission's binding policy statements do not bar the defendant from obtaining that relief, see Sentencing Guidelines § 1B1.10(b), and the district court would exercise its discretion to permit relief (while taking into account applicable factors set forth in 18 U.S.C. 3553(a) and the advantages already gained by the defendant in connection with the plea agreement, such as dismissal of other charges, see, *e.g.*, *Dillon* v. *United States*, 560 U.S. 817, 825-828 (2010)).

Petitioner suggests (Pet. 30-31) that this case falls into that subset of cases. But even if that were correct, see pp. 17-19, *infra*, it would say very little about the number of cases that the disagreement between the plurality and Justice Sotomayor's decision would affect. Far more informative is petitioner's agreement (Pet. 27) that most other cases that have presented this issue

have done so in a posture in which its resolution was unlikely to matter.

2. Petitioner also suggests (*e.g.*, Pet. 11-16, 19-21) that this case would also present an opportunity for this Court to consider more abstractly how the *Marks* analysis should be conducted. When the Court has chosen to review a dispute about the application of *Marks* to a fractured decision, however, it has simply revisited the underlying question addressed in that decision rather than "pursu[ing] the *Marks* inquiry to the utmost logical possibility." *Nichols*, 511 U.S. at 746; see *Grutter* v. *Bollinger*, 539 U.S. 306, 325 (2003). Although the petition lists the question presented in *Freeman* as a subsidiary question presented here, Pet. ii, it includes no meaningful argument for why it would independently warrant this Court's review. And direct consideration of that issue could moot (and would complicate) consideration of the *Marks* issue on which petitioner is focused.

In any event, to the extent further clarification of *Marks* might be necessary in some case, this would be an unsuitable vehicle for providing it. Whatever difficulties *Marks* may present in other cases, the application of *Marks* to *Freeman* is straightforward. See, *e.g.*, Pet. App. 13a (noting that, "applying the rule of *Marks* * * * to *Freeman*, it is clear that Justice Sotomayor's opinion controls"); *Duvall*, 740 F.3d at 611 (Kavanaugh, J., concurring in the denial of rehearing en banc) ("Applying the *Marks* rule to *Freeman* is fairly easy."); *Dixon*, 687 F.3d at 359 (*Marks* is "easy to apply" to *Freeman*). It is a 4-1-4 decision in which the single Justice concurrence occupies "an intermediate position." *Freeman*, 564 U.S. at 532 (plurality opinion). As previously explained, a defendant who is eligible for a Section

3582(c)(2) reduction under Justice Sotomayor's approach would also be eligible under the plurality's approach.[4] The two circuits that have adopted the plurality approach have done so largely based on an erroneous understanding of the plurality and Justice Sotomayor's opinion. See pp. 12-13, *supra*. Consideration of the *Marks* issue here would thus provide little guidance for the application of *Marks* in other potentially more complicated scenarios.

3. Finally, review is unwarranted for the additional reason that it is unlikely that petitioner would have received a sentencing reduction even if he were eligible for one. See, *e.g.*, *Dillon*, 560 U.S. at 827 (stating if a prisoner is eligible for a sentence reduction under Section 3582(c) the district court must "consider any applicable § 3553(a) factors and determine whether, in its discretion, the reduction authorized * * * is warranted in whole or in part under the particular circumstances of the case"). Here, the effect of Amendments 782 and 788 would be to reduce petitioner's offense level by two, which in turn would reduce his Guidelines sentencing range to 151 to 188 months of imprisonment. The agreed-upon 180-month sentence that petitioner received is within that reduced range and any reduction below 180 months would not be justified in this case.

Petitioner's criminal activities were extremely serious. He was involved in a significant methamphetamine trafficking ring in Georgia. See PSR ¶¶ 12-27. Following a controlled buy with a confidential informant,

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[4] Conversely, any defendant ineligible for a Section 3582(c)(2) reduction under Justice Sotomayor's approach would also be ineligible under the dissent's approach, which would preclude such relief in all cases involving Rule 11(c)(1)(C) plea agreements. See *Freeman*, 544 U.S. at 544-546 (Roberts, C.J., dissenting).

he was personally found in possession of $14,124 in cash, 257.2 grams of methamphetamine, and a loaded firearm with an obliterated serial number. See PSR ¶ 13. Had the parties not entered into the plea agreement, petitioner would have been subject to two additional serious charges—namely, possession with intent to distribute 50 grams or more of a mixture or substance containing methamphetamine, in violation of 21 U.S.C. 841(a) and (b)(1)(B)(viii); and possession of a firearm with an obliterated serial number, in violation of 18 U.S.C. 922(k). See Indictment 1-3. In light of petitioner's extensive criminal history, see PSR ¶¶ 41-62, he also would have faced a mandatory sentence of life imprisonment. See 21 U.S.C. 841(b)(1)(A) (mandating life imprisonment for "any person [who] commits a violation of this subparagraph * * * after two or more prior convictions for a felony drug offense have become final); Pet. App. 55a (in exchange for guilty plea and recommended 180-month sentence, government dismissed remaining counts and promised not to pursue a recidivist enhancement under 21 U.S.C. 851); see also Pet. App. 42a (government stating at sentencing that, but for the plea agreement, petitioner "was facing life without parole with his prior convictions and the kind of drug quantities that were involved here").

Because petitioner realized considerable benefits from the plea agreement, and because the district court already found when imposing his original stipulated sentence that it was fair and reasonable, see, *e.g.*, Pet. App. 47a ("The court is convinced it has imposed a reasonable sentence."), a remand for consideration of a modification to the sentence pursuant to Section 3582(c) would be unlikely to change the outcome of petitioner's case. See *Freeman*, 564 U.S. at 532 (plurality opinion)

("If the district court, based on its experience and informed judgment, concludes the [plea] agreement led to a more lenient sentence than would otherwise have been imposed, it can deny the motion * * * [to] ensure[] that § 3582(c)(2) does not produce a windfall.").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 2017

No. 17-155

IN THE

Supreme Court of the United States

ERIK LINDSEY HUGHES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTRODUCTION 1

ARGUMENT 2

I. The Courts Of Appeals Are Irretrievably Divided, And The *Freeman* Question Is, And Will Continue To Be, Important. 2

II. This Case Is Also An Ideal Vehicle For Considering The *Marks* Question. 6

III. The Eleventh Circuit Is Wrong. 9

CONCLUSION 12

TABLE OF AUTHORITIES

Page(s)

Cases

Freeman v. United States,
564 U.S. 522 (2011).....1, 4, 6, 7, 10

Gall v. United States,
552 U.S. 38 (2007).....11

King v. Palmer,
950 F.2d 771 (D.C. Cir. 1991).....7, 9, 10

Marks v. United States,
430 U.S. 188 (1977).....1, 7

Memoirs v. Massachusetts,
383 U.S. 413 (1966).....7

Missouri v. Frye,
566 U.S. 134 (2012).....6

Nichols v. United States,
511 U.S. 738 (1994).....8

United States v. Duvall,
705 F.3d 479 (D.C. Cir. 2013).....4

United States v. Duvall,
740 F.3d 604 (D.C. Cir. 2013).....7, 9

United States v. Epps,
707 F.3d 337 (D.C. Cir. 2013).....7

United States v. Haggerty,
731 F.3d 1094 (10th Cir. 2013).....11

United States v. Hill,
674 F. App'x 738 (9th Cir. 2017) 11

Wesberry v. Sanders,
376 U.S. 1 (1964).....8

Other Authorities

Memorandum Opinion and Order on Sentencing, *United States v. Brownfield*, No. 1:08-cr-00452-JLK (D. Colo. Dec. 18, 2009), Dkt. 48.....11

U.S.S.C., *2015 Sourcebook of Federal Sentencing Statistics*, Figure C (2016), http://tinyurl.com/yble3job 3

U.S.S.C., *Guidelines Manual 2016* (Nov. 1, 2016), http://tinyurl.com/y6ulyxpk.....3

U.S.S.C., *Guidelines Manual 2016: Supp. to App'x C* (Nov. 1, 2016), http://tinyurl.com/yb6qsmhp 3

Ryan C. Williams, *Questioning* Marks: *Plurality Decisions and Precedential Constraint*, 69 Stan. L. Rev. 795 (2017).....8

INTRODUCTION

Unlike previous petitions, this Petition presents a clean vehicle for deciding two critical, recurring questions over which the courts of appeals are hopelessly divided: (1) Whether *Marks v. United States*, 430 U.S. 188 (1977), means that the concurring opinion in a 4-1-4 decision represents the holding of the Court where neither the plurality's reasoning nor the concurrence's reasoning is a logical subset of the other; and (2) Whether, under *Marks*, the lower courts are bound by the four-Justice plurality opinion in *Freeman v. United States*, 564 U.S. 522 (2011), or, instead, by the separate concurring opinion with which eight other Justices disagreed.

The Government appears to agree with much of our Petition. It accepts that there is a circuit split, Opp. 17, and agrees that "further clarification of *Marks* might be necessary," Opp. 16. It concedes that Mr. Hughes falls into the "subset" of cases affected by the *Freeman* confusion. Opp. 15. And it does not contest that, should this Court reverse the decision below, Mr. Hughes is eligible for the sentence reduction he seeks (though it suggests that any reduction in sentence is, in its view, not "justified"). Opp. 17.

Instead of explaining why Justice Sotomayor's single-Justice concurrence warrants precedential import, however, the Government says that the issue does not matter because, in the Government's view, prosecutors can draft plea agreements to skirt around the issue—an argument that the Petition already refuted. Pet. 25-26. But there is no indication that prosecutors and defendants are generally entering into

such tailored plea arrangements or that such arrangements would generally be feasible.

The Government then argues that "the application of *Marks* to *Freeman* is straightforward," Opp. 16, and, in one sentence, dismisses the D.C. and Ninth Circuits as failing to properly understand the opinions in *Freeman*. That conclusory assertion only emphasizes the deep and entrenched split among the courts of appeals.

Moreover, the Government's application of *Marks* to *Freeman* is just plain wrong. Justice Sotomayor's concurrence in *Freeman* is not a "logical subset" of the plurality opinion and should not be treated as controlling precedent when every other Justice disagreed with that reasoning. This Court now has a clean opportunity to review the *Freeman* question and resolve the lower courts' confusion.

ARGUMENT

I. The Courts Of Appeals Are Irretrievably Divided, And The *Freeman* Question Is, And Will Continue To Be, Important.

This Court could not agree when it issued a 4-1-4 decision in *Freeman*, and the lower courts have fared no better in applying the disjointed ruling. The Government does not dispute that there is a 10-2 circuit split over whether the concurrence controls, but argues that "disagreement ... about the application of *Freeman* is of limited significance" because it is "likely to be a relatively short-lived issue for the courts."

Opp. 14. One need only look at the long list of petitions filed on this issue to see that this is not the case. *See* Opp. 9, n.2 (identifying nine petitions seeking review of *Freeman*, excluding this one, filed since 2012).

1. Sentencing guideline revisions affect tens of thousands of defendants, *see* U.S.S.C., *Guidelines Manual 2016: Supp. to App'x C* 86 (Nov. 1, 2016), http://tinyurl.com/yb6qsmhp (estimating that "46,000 offenders may benefit from retroactive application of Amendment 782" alone), the vast majority of whom entered guilty pleas, U.S.S.C., *2015 Sourcebook of Federal Sentencing Statistics*, Figure C (2016), http://tinyurl.com/yble3job (97% of sentencing decisions arise in the context of a guilty plea). And the significance of the issue for affected individuals cannot be overstated. "[T]he average sentence reduction" for each prisoner eligible under Amendment 782 alone "would be approximately 18 percent." U.S.S.C., *Guidelines Manual, supra*, at 86.

The Government mistakenly argues that Mr. Hughes would not receive a sentence reduction "even if he were eligible for one" because his current sentence is within the amended range. Opp. 17. There is no prohibition on reducing a sentence that is already within the amended range. In fact, the Application Notes to Amendment 782 contemplate exactly this scenario and explain that "the court ... may reduce the defendant's term of imprisonment" within the amended range. U.S.S.C., *Guidelines Manual 2016* 44-45 (Nov. 1, 2016), http://tinyurl.com/y6ulyxpk (Application of Subsection (b)(2)). And, as acknowledged in the Manual and by the Government itself, the precise extent of a reduction is best left to the district

court's discretion. *See* Opp. 19 ("'If the *district court* ... concludes the [plea] agreement led to a more lenient sentence than would otherwise have been imposed, it *can* deny the motion'" for a sentence reduction.) (quoting *Freeman*, 564 U.S. at 532) (emphasis added). The Government cannot reliably predict whether the court would feel "justified" in further reducing Mr. Hughes's sentence. Opp. 17.

2. The Government further downplays the issue by asserting that prosecutors "can" draft plea agreements to make the issue go away. But there is no evidence that prosecutors actually *are* drafting plea agreements with the *Freeman* concurrence in mind. The Government has not refuted the point (made in the Petition, Pet. 25-26) that the stream of recent *Freeman* petitions demonstrates that plea agreements have not materially changed since *Freeman* was decided over six years ago. The Government cites one example of a U.S. Attorney's Office stating that it "'now drafts Rule 11(c)(1)(C) plea agreements with an eye to avoiding later litigation on the *Freeman* issue.'" Opp. 14 (quoting *United States v. Duvall*, 705 F.3d 479, 484 n.2 (D.C. Cir. 2013)). But that was not the case for Mr. Hughes, or Mr. Negron, or Mr. Gilmore, or Mr. Sullivan, or any of the thousands of federal prisoners who signed C-type plea agreements since *Freeman* that contain no language squarely addressing the defendant's eligibility for a future sentence reduction. For these defendants, the issue is real and the consequence is concrete.

One reason no one seems to be adopting the Government's proposed workarounds is that they do not solve the problem. The Government suggests that

prosecutors and defendants can just employ A-type or B-type plea agreements instead of C-type agreements. Opp. 14. But that is a non sequitur. The question here pertains to the impact of later sentencing guideline changes upon sentences imposed in light of C-type plea agreements. It is no answer for the Government to say that C-type agreements don't have to be used.

The Government also suggests that defendants can just agree to waive the right to seek relief in the event of a subsequent Guidelines amendment. Opp. 14. Maybe, in theory. But as a practical matter, as the Petition noted, it is unclear why defendants would generally agree to such a provision, and the Government conspicuously leaves that point unanswered.

The Government's third suggestion is that prosecutors and defendants can agree to insert into plea agreements clauses stating that the agreed-upon sentence is (or is not) "based on" a particular Sentencing Guidelines calculation. Opp. 14. That suggestion is problematic as well, because any purported benefit derived from such a change in drafting would presumably be limited to jurisdictions that accept the *Freeman* concurrence as controlling to begin with. A defendant in Georgia, for example, would be eligible for a sentence reduction if his lawyer and the prosecutor negotiated an agreement that employed explicit language noting that the plea was "based on" the Sentencing Guidelines. But a defendant in California could be eligible for a sentence reduction regardless of the terms of his written plea agreement, because the Ninth Circuit, like the D.C. Circuit, focuses on the

reasons underlying the judge's imposition of the sentence as opposed to the reasons underlying the parties' agreement.[1]

Relying on the drafting process to determine a defendant's future eligibility for a sentence reduction would also extend power to prosecutors to grant or withhold the opportunity for future sentence reductions—a power that Congress reserved for the courts. Plea bargaining is "not some adjunct to the criminal justice system; it *is* the criminal justice system," *Missouri v. Frye*, 566 U.S. 134, 144 (2012) (emphasis in original), and it should not be used to further strip defendants of their rights. The *Freeman* plurality rejected the notion that plea agreements should control the outcomes of these cases, explaining that such a solution would "permit the very disparities the Sentencing Reform Act seeks to eliminate." 564 U.S. at 533. Those "consequences" are "significant," *id.*; the solution cannot be to rely on the unsubstantiated promises the Government makes here.

II. This Case Is Also An Ideal Vehicle For Considering The *Marks* Question.

The *Freeman* question arises because this Court has never clarified the statement in *Marks* that the controlling opinion in a fractured decision is the one

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[1] In addition, drafting around the concurrence in *Freeman* would require a high degree of specificity. Mr. Hughes's plea agreement made no fewer than six references to the Sentencing Guidelines, *see* Pet. 6, but none of those references—either individually or in combination—was deemed sufficient to qualify his sentence as "based on" the Guidelines. Pet. App. 14a-15a, 28a-30a.

that "concur[s] in the judgment on the narrowest grounds." 430 U.S. at 193 (internal citations omitted). *See also* Pet. 11-19. According to the Government, no clarification is needed: "'In splintered cases, there are multiple opinions precisely *because* the Justices did not agree on a common rationale.'" Opp. 13 (quoting *United States v. Duvall*, 740 F.3d 604, 613 (D.C. Cir. 2013) (Kavanaugh, J., concurring in the denial of rehearing en banc)). That is incorrect.

Fractured decisions often contain some common rationale underlying the judgment. *See, e.g.*, *Memoirs v. Massachusetts*, 383 U.S. 413 (1966) (plurality affirmed court of appeals based on *Roth* plus two additional criteria, whereas concurrence would have affirmed based on *Roth* alone). The application of *Marks* is clear in those cases because the "narrowest ground" can be found in the common rationale. *Memoirs*, 383 U.S. 413 ("narrowest ground" was the *Roth* rule). Further clarification is needed, however, in cases like this one where the plurality and concurrence "agree on very little except the judgment." *Freeman*, 564 U.S. at 544 (Roberts, C.J., dissenting). In such a setting, there is "no practical middle ground between" the plurality and the concurrence, *United States v. Epps*, 707 F.3d 337, 348-49 (D.C. Cir. 2013), so no decision "can be meaningfully regarded as 'narrower,'" *King v. Palmer*, 950 F.2d 771, 781 (D.C. Cir. 1991). *See also* Pet. 12; *Freeman*, 564 U.S. at 526 (noting that Justice Sotomayor would reverse the judgment on a *different* ground") (emphasis added).

The Government glosses over the *Marks* question, asserting that "[w]hen the Court has chosen to review

a dispute about the application of *Marks* to a fractured decision, ... it has simply revisited the underlying question addressed in that decision rather than 'pursu[ing] the *Marks* inquiry to the utmost logical possibility.'" Opp. 16 (quoting *Nichols v. United States*, 511 U.S. 738, 746 (1994)). But that is precisely the problem. In cases presenting a potential vehicle for considering *Marks*, the Court has sidestepped the *Marks* question by focusing on the narrower question of how it applies to a particular fractured decision. But this approach means that the Court has repeatedly had to review petitions seeking to clarify the meaning of a specific, fractured decision. *See* Pet. 23-24. Clarifying *Marks* itself would help to resolve a wide range of legal questions. Pet. 19-20. It is simply not true that "[c]onsideration of the *Marks* issue here would ... provide little guidance for the application of *Marks* in other ... scenarios." Opp. 17. Clarification of *Marks* would be beneficial across the board for lower courts attempting to apply fractured decisions of this Court. Ryan C. Williams, *Questioning* Marks: *Plurality Decisions and Precedential Constraint*, 69 Stan. L. Rev. 795, 799 (2017) ("The conceptual confusion surrounding *Marks* presents an important practical challenge for lower courts.").

When the Government does engage the *Marks* argument, it simply assumes its own conclusion by arguing that "the application of *Marks* to *Freeman* is straightforward," because "'it is clear that Justice Sotomayor's opinion controls.'" Opp. 16 (quoting Pet. App. 13a). That is the "model of circular reasoning" because "the premises of the argument feed on the conclusion." *Wesberry v. Sanders*, 376 U.S. 1, 25 (1964) (Harlan, J., dissenting). If the application of

Marks to *Freeman* were so "easy," Opp. 16 (quoting *Duvall*, 740 F.3d at 611 (Kavanaugh, J., concurring in the denial of rehearing en banc)), there would not be two courts of appeals that apply *Marks* to *Freeman* in a different way and with completely different results than the others. Instead, the Government conclusorily dismisses the Ninth and D.C. Circuits' understanding of *Freeman* as "erroneous." Opp. 17. That assertion simply confirms the existing, entrenched circuit split.

III. The Eleventh Circuit Is Wrong.

Finally, the Eleventh Circuit's decision below is wrong on the merits. The concurrence in *Freeman* is not the "narrowest grounds" supporting the *Freeman* judgment. According to the Government, the concurrence is "narrower" than the plurality because, under the plurality's view, the sentencing court "invariably" will rely on the Guidelines if the plea agreement also relies on the Guidelines. Opp. 10. The plurality would therefore "always" grant relief when Justice Sotomayor's concurrence would do so. Opp. 11. Accordingly, the Government says, Justice Sotomayor's concurrence is controlling because "a majority of the *Freeman* Court would agree with whatever *result* flowed from [its] application." *Id.* (emphasis added).

As an initial matter, the Eleventh Circuit employs a "results" analysis even though it is clear that "*Marks* is workable ... only when one opinion is a *logical subset* of other, broader opinions." *King*, 950 F.2d at 781 (emphasis added); *see* Pet. 12-13, 17-19, 31-33. The "results" approach treats as binding a legal rationale that every Justice except one has rejected. But

"[w]hen eight of nine Justices do not subscribe to a given approach to a legal question, it surely cannot be proper to endow that approach with controlling force, no matter how persuasive it may be." *King*, 950 F.2d at 782.

In any event, whether one applies the results approach or the logical subset approach, it is clear that Justice Sotomayor's *Freeman* concurrence is neither a "middle ground," Opp. 11 (citation omitted), nor a "logical subset" of the plurality opinion. As the Petition explained, there are any number of scenarios in which a sentencing court would grant relief under the *Freeman* concurrence but not the *Freeman* plurality. Pet. 32-33.

The *Freeman* plurality acknowledged that "[e]ven when a defendant enters into an 11(c)(1)(C) agreement, the judge's decision to accept the plea and impose the recommended sentence is *likely* to be based on the Guidelines." 564 U.S. at 534 (emphasis added). But "likely" does not mean always. First, the sentencing judge may never make explicit reference to the Guidelines, even though the plea agreement "express[ly]" relies on them," *Freeman*, 564 U.S. at 539 (Sotomayor, J., concurring), in which case a sentence reduction would be warranted under Justice Sotomayor's concurrence, but not under the plurality opinion. Or, if a sentencing judge rejects the plea agreement's Guidelines range but accepts the agreement anyway, it is the concurrence that might allow future relief, not the plurality. Alternatively, if the plea agreement explicitly contains and refers to a Guidelines range, but the sentencing judge relies on a

different Guidelines range before ultimately accepting the agreement, a future sentence reduction could depend on *which* Guidelines range was modified. If the district court's Guidelines range were later retroactively modified, the *Freeman* plurality would allow relief, but if the Guidelines range proposed by the parties were later retroactively modified, the *Freeman* concurrence would allow relief.

The Government diminishes these examples as unrealistic and inconsistent with *Freeman*, Opp. 13, but they are not abstract hypotheticals. For instance, although this Court mandates that "district court[s] ... begin all sentencing proceedings by correctly calculating the applicable Guidelines range," *Gall v. United States*, 552 U.S. 38, 49 (2007), sentencing courts sometimes ignore them. *See, e.g., United States v. Haggerty*, 731 F.3d 1094, 1101 (10th Cir. 2013) ("the district court did not consider the [Guidelines] or its commentary"). It is also a stretch to say that a decision "choos[ing] not to apply" the Guidelines is "based on" those Guidelines. Memorandum Opinion and Order on Sentencing at 8, *United States v. Brownfield*, No. 1:08-cr-00452-JLK (D. Colo. Dec. 18, 2009), Dkt. 48. And in one recent case, the parties expressly agreed to one Guidelines range, while the judge expressly applied a different range. *United States v. Hill*, 674 F. App'x 738 (9th Cir. 2017). The district court there denied the motion for a sentence reduction because the sentence was already at the bottom of the court's amended range. *Id.* The Ninth Circuit affirmed, applying the *Freeman* plurality view. *Id.* at 739 (finding the sentencing judge's reasoning controlling, rather than the plea agreement). Under the *Freeman* concurrence, however, the defendant would have

been eligible for a reduction based on the resulting reduction to the parties' agreed-upon Guidelines range.

The decision of the Eleventh Circuit is wrong. And there can be no serious dispute that this is a significant issue on which the courts of appeals have an entrenched disagreement. This is a highly disputed, highly important question worthy of this Court's review.

CONCLUSION

The petition should be granted.

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No. 17-155

IN THE

Supreme Court of the United States

ERIK LINDSEY HUGHES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF PETITIONER

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QUESTIONS PRESENTED

This Court explained in *Marks v. United States*, 430 U.S. 188, 193 (1977), that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'" In *Freeman v. United States*, 564 U.S. 522 (2011), the Court issued a fractured 4-1-4 decision concluding that a defendant who enters into a plea agreement under Fed. R. Crim. P. 11(c)(1)(C) may be eligible for a reduction in his sentence if the Sentencing Commission subsequently issues a retroactive amendment to the Sentencing Guidelines. But the four-Justice plurality and Justice Sotomayor's concurrence shared no common rationale.

The questions presented are:

1. Whether this Court's decision in *Marks* means that the concurring opinion in a 4-1-4 decision represents the holding of the Court where neither the plurality's reasoning nor the concurrence's reasoning is a logical subset of the other.

2. Whether, under *Marks*, the lower courts are bound by the four-Justice plurality opinion in *Freeman*, or, instead, by Justice Sotomayor's separate concurring opinion with which all eight other Justices disagreed.

3. Whether, as the four-Justice plurality in *Freeman* concluded, a defendant who enters into a Fed. R. Crim. P. 11(c)(1)(C) plea agreement is generally eligible for a sentence reduction if there is a later, retroactive amendment to the relevant Sentencing Guidelines range.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES vi

OPINIONS AND ORDERS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS AND RULES INVOLVED 1

STATEMENT OF THE CASE 2

- Congress Authorizes Sentences To Be Retroactively Reduced Based On Subsequently Amended Guidelines 2
- The Court Divides 4-1-4 Over When Reductions Are Available To Defendants Who Enter Into Plea Agreements Under Rule 11(c)(1)(C). 5
- Mr. Hughes Enters Into A Plea Agreement Under Rule 11(c)(1)(C) And Is Sentenced To 180 Months In Prison. 7
- The Sentencing Commission Retroactively Reduces The Relevant Guidelines Range, But Mr. Hughes Is Denied The Opportunity To Seek A Reduction 8

SUMMARY OF THE ARGUMENT 10

ARGUMENT 13

I. Mr. Hughes Is Eligible For § 3582(c)(2) Relief Because His Sentence Was "Based On" A Sentencing Guidelines Range That Subsequently Was Lowered. 13

A. A defendant who enters into a C-type agreement is sentenced "based on" a Guidelines range when the Guidelines bear a reasonably close connection to the sentence..... 13

1. The term "based on" invokes standard principles of causation..... 13

2. The sentencing judge's rationale and the parties' agreement each can show that the Guidelines bore a reasonably close connection to the sentence. 17

3. The Guidelines often but not always will bear a reasonably close connection to the sentence of a C-type defendant. 23

B. Foreclosing or severely limiting C-type plea recipients' eligibility for relief under § 3582(c)(2) is inconsistent with the Sentencing Act and likely to lead to significant inequities..... 28

C. Mr. Hughes is eligible for relief under § 3582(c)(2). 35

II. The Court Of Appeals Erred By Treating The Single-Justice Concurrence In *Freeman* As Binding Precedent. 37

A. An opinion constitutes the "narrowest grounds" under *Marks* when it represents a logical subset of reasoning embraced by a majority of the Court. 38

B. The test adopted by the decision below is unworkable, and would transform theories rejected by the majority of the Court into binding precedent. 44

C. The single-Justice concurrence in *Freeman* is not binding precedent. 51

D. Alternatively, the Court may wish to revisit *Marks*'s treatment of divided opinions and hold that only opinions joined by a majority of Justices merit precedential status. 55

CONCLUSION 60

TABLE OF AUTHORITIES

Page(s)

Cases

Alaska v. Troy,
258 U.S. 101 (1922).....39

Arizona v. Evans,
514 U.S. 1 (1995).....58

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446 U.S. 222 (1980).....48

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137 S. Ct. 1296 (2017).....15

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501 U.S. 560 (1991).....47

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888 F.2d 975 (3d Cir. 1989).....48

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553 U.S. 639 (2008).....27

Caldwell v. Mississippi,
472 U.S. 320 (1985).....43, 44

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511 U.S. 328 (1994).....29

Costco Wholesale Corp. v. Omega, S.A.,
562 U.S. 40 (2010).....58

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Freeman v. United States, 564 U.S. 522 (2011) ..... *passim*

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152 F.3d 362 (5th Cir. 1998).....47

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950 F.2d 771 (D.C. Cir. 1991)
(en banc).....12, 38, 41, 42, 52

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568 U.S. 519 (2013).....58

Marks v. United States,
430 U.S. 188 (1977).....7, 12, 38, 40, 41

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383 U.S. 413 (1966).....40, 41

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511 U.S. 738 (1994).....48, 55, 56

OBB Personenverkehr AG v. Sachs,
136 S. Ct. 390 (2015).....15

Patterson v. McLean Credit Union,
491 U.S. 164 (1989).....57

Payne v. Tennessee,
501 U.S. 808 (1991).....57

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555 U.S. 223 (2009).....57

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Council for Clean Air*,
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286 P.3d 469 (Cal. 2012).....51

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569 U.S. 530 (2013).....3, 25, 27

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547 U.S. 715 (2006).....48, 50

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73 U.S. 213 (1867).....46

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490 U.S. 477 (1989).....51

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512 U.S. 1 (1994).....43

Rowland v. Washtenaw Cty. Rd. Comm'n,
731 N.W.2d 41 (Mich. 2007).....57

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551 U.S. 47 (2007).....15, 26, 27

Saudi Arabia v. Nelson,
507 U.S. 349 (1993).....15

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517 U.S. 44 (1996).....44, 45

Smith v. City of Jackson,
544 U.S. 228 (2005).....46

Sosa v. Alvarez-Machain,
542 U.S. 692 (2004).....16

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555 U.S. 261 (2009).....53

State v. Kikuta,
253 P.3d 639 (Haw. 2011).....57

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562 U.S. 411 (2011).....16, 22

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566 U.S. 560 (2012).....14

Triplett Grille, Inc. v. City of Akron,
40 F.3d 129 (6th Cir. 1994).....57

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472 U.S. 675 (1985).....16

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543 U.S. 220 (2005).....3

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454 F.3d 1142 (10th Cir. 2006).....42

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584 F.3d 979 (10th Cir. 2009).....31

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556 F.3d 857 (8th Cir. 2009).....35

United States v. Davis,
825 F.3d 1014 (9th Cir. 2016) (en banc) 6, 20, 21, 27, 42, 43, 49, 50, 52, 53, 54, 55

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687 F.3d 356 (7th Cir. 2012) 32, 33, 47

United States v. Duvall,
705 F.3d 479 (D.C. Cir. 2013) 28

United States v. Duvall,
740 F.3d 604 (D.C. Cir. 2013) (en banc) 40, 42, 43, 45, 46, 49, 50, 53, 55

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707 F.3d 337 (D.C. Cir. 2013) 6, 20, 21, 37, 49, 52, 53, 54, 55

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758 F.3d 749 (6th Cir. 2014) 28, 54

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464 F.3d 723 (7th Cir. 2006) 50

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432 F.3d 115 (2d Cir. 2005) 32

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520 U.S. 670 (1997) 17, 18

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467 F.3d 56 (1st Cir. 2006) 44, 50

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844 F.3d 102 (2d Cir. 2016) 28

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315 U.S. 203 (1942) 39

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157 F. Supp. 3d 207 (E.D.N.Y. 2016) 54

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553 U.S. 507 (2008) 52, 56

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172 U.S. 576 (1899) 46

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18 U.S.C. § 3553(c) 19

18 U.S.C. § 3582 ..... 29, 34, 53

18 U.S.C. § 3582(c)(2) ..... *passim*

18 U.S.C. § 3742(a)(2) 23

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Fed. R. Crim. P. 11(b) 18

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JURISDICTION

The court of appeals entered judgment on February 27, 2017. Pet. App. 1a. On May 22, 2017, Justice Thomas extended the time for filing a petition for certiorari to July 27, 2017. The certiorari petition was filed on July 27, 2017, and granted on December 8, 2017. The Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AND RULES INVOLVED

18 U.S.C. § 3582(c)(2) provides:

> The court may not modify a term of imprisonment once it has been imposed except that ... in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. § 994(o), ... the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.

Federal Rule of Criminal Procedure 11(c)(1)(C) provides:

> (c) Plea Agreement Procedure.
>
> (1) In General. An attorney for the government and the defendant's attorney, or the defendant when proceeding pro se, may discuss and reach a plea agreement. The court must not participate in these discussions. If the defendant pleads guilty or nolo contendere to either a charged offense or a lesser or related offense, the plea agreement may specify that an attorney for the government will:
>
> ...
>
> (C) agree that a specific sentence or sentencing range is the appropriate disposition of the case, or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply (such a recommendation or request binds the court once the court accepts the plea agreement).

STATEMENT OF THE CASE

Congress Authorizes Sentences To Be Retroactively Reduced Based On Subsequently Amended Guidelines.

In the Sentencing Reform Act of 1984, 18 U.S.C. § 3551 et seq., Congress overhauled federal sentencing law to "avoid unwarranted sentence disparities

among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. § 3553(a)(6); *see* S. Rep. No. 98-225, at 51-52 (1983). Congress established the U.S. Sentencing Commission and tasked it with creating Sentencing Guidelines that establish an "appropriate kind and range of sentence for a given category of offense committed by a given category of offender." S. Rep. No. 98-225, at 51; *see* 28 U.S.C. § 994(a). Although the Guidelines no longer are mandatory, *United States v. Booker*, 543 U.S. 220, 264-65 (2005), courts still must consider the Guidelines "in determining the particular sentence to be imposed." 18 U.S.C. § 3553(a)(4); *see Peugh v. United States*, 569 U.S. 530, 536 (2013). Accordingly, the Guidelines remain "the starting point and the initial benchmark" for "all sentencing proceedings." *Gall v. United States*, 552 U.S. 38, 49 (2007).

The Guidelines are not static. Congress directed the Commission to "periodically ... review and revise" them. 28 U.S.C. § 994(o). In so doing, the Commission sometimes reduces the Guidelines range associated with a particular offense. Usually it does so to avoid unwarranted disparities—for example, among those convicted of crimes involving similar types of drugs—or to avoid sentences longer than necessary to achieve penological purposes. *E.g.*, U.S.S.G. app. C, amend. 706 (2013) (2007 amendment reducing base offense level for most crack cocaine offenses by two levels); *id.*

amend. 505 (1994 amendment eliminating top two levels in drug quantity table).[1]

The Commission has the power to make these reductions retroactive. 28 U.S.C. § 994(u); *see Freeman v. United States*, 564 U.S. 522, 525 (2011) (plurality opinion) ("The Act allows retroactive amendments to the Guidelines for cases where the Guidelines become a cause of inequality, not a bulwark against it."). And, when an amendment has been given retroactive effect, a defendant may move to have his sentence reduced. Thus, a district court may (but is not required to) reduce the sentence of a defendant

> who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission, ... if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.

18 U.S.C. § 3582(c)(2). These sentence reductions are intended to "remedy systemic injustice"; the statute prevents inequitable disparities between similarly situated defendants who happen to have been sentenced before and after the Commission decided to change a Guideline. *Freeman*, 564 U.S. at 533-34 (plurality).

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[1] Unless otherwise indicated, citations are to the 2013 version of the Guidelines, which was in effect at the time Mr. Hughes was sentenced. There are no relevant differences between the 2013 version and the currently effective version.

The Court Divides 4-1-4 Over When Reductions Are Available To Defendants Who Enter Into Plea Agreements Under Rule 11(c)(1)(C).

In *Freeman*, the Court addressed whether § 3582(c)(2) relief is available to defendants who enter plea agreements under Rule 11(c)(1)(C). Under these "C-type" agreements, the government and the defendant agree on "a specific sentence or sentencing range." Fed. R. Crim. P. 11(c)(1)(C). That "recommendation or request binds the court"—but only "once the court accepts the plea agreement." *Id.* Five Justices agreed that defendants who enter C-type agreements are *sometimes* eligible for a reduction under § 3582(c)(2). But the Court split 4-1-4 over the rationale for such relief and the circumstances under which defendants are eligible for it. The disagreement centered on the meaning of the statutory term "based on":

- A four-Justice plurality concluded that a defendant is sentenced "based on" the sentencing judge's approval of the sentence. Accordingly, a defendant is "sentenced ... based on a sentencing range" if that range "was a relevant part of the analytic framework the judge used to determine the sentence or approve the agreement." 564 U.S. at 529-30.

- Justice Sotomayor concurred separately in the judgment only, reasoning that a sentence pursuant to a C-type agreement is "based on" the agreement. *Id.* at 535-36. A sentence therefore is "based on" a Guidelines range when the agreement "expressly

uses a Guidelines sentencing range applicable to the charged offense to establish the term of imprisonment," or "provide[s] for a specific term of imprisonment—such as a number of months" and it "is evident from the agreement" that the term is based on the Guidelines. *Id.* at 534, 539.

- Four Justices dissented. They agreed with the plurality that "the inquiry properly looks to what the *judge*" decides. *Id.* at 547 (Roberts, C.J., dissenting). But they reasoned that a judge at sentencing "need[s] to consult one thing and one thing only—the plea agreement." *Id.* at 545. Accordingly, a sentence imposed after a C-type agreement is "based on" the agreement, not the Guidelines, and is never eligible for reduction. *Id.* at 544-45.

In the wake of *Freeman*, two courts of appeals recognized that no single rationale had captured a majority of the Court. Accordingly, they explained, the Court's fractured opinions produced a judgment but announced no binding rule of decision.[2] Multiple other courts—including the Eleventh Circuit in the decision below—concluded that the concurrence provided the "narrowest" rationale, *see Marks v. United States*, 430 U.S. 188, 193 (1977), and therefore was binding.

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[2] *United States v. Davis*, 825 F.3d 1014, 1023-26 (9th Cir. 2016) (en banc); *United States v. Epps*, 707 F.3d 337, 350-51 (D.C. Cir. 2013).

Mr. Hughes Enters Into A Plea Agreement Under Rule 11(c)(1)(C) And Is Sentenced To 180 Months In Prison.

In 2013, a federal grand jury indicted Erik Hughes—a father whose drug "addiction has controlled him for a large part of his adult life," Pet. App. 41a-42a—on drug and firearm offenses, including under 21 U.S.C. §§ 841(a)(1), (b)(1)(A)(viii), and 846. Pet. App. 3a, 16a-17a. Mr. Hughes entered into a plea agreement under Rule 11(c)(1)(C). Pet. App. 50a-70a. He pleaded guilty to conspiracy to possess with intent to distribute at least 500 grams of a mixture or substance containing methamphetamine, and to being a felon in possession of a firearm. Pet. App. 16a-17a.

The agreement provided "that the Court should impose a sentence of 180 months of imprisonment." Pet. App. 54a. The record makes plain that this sentence was negotiated "in the shadow of" the Guidelines. *Freeman*, 564 U.S. at 538 (concurrence). For instance, during plea negotiations, "it was discussed that [Mr. Hughes's Sentencing] Guideline range was 188-235 months." Pet. App. 74a. The plea agreement made clear that, "before imposing sentence in this case, the Court will be required to consider, among other factors, the provisions of the United States Sentencing Guidelines." Pet. App. 54a. But, notwithstanding this and other references to the Guidelines, *infra* 36, the agreement did not say *in haec verba* that the sentence was based on the Guidelines. Pet. App. 54a.

At the sentencing hearing, the court calculated Mr. Hughes's base offense level and his criminal history category under the Guidelines. Pet. App. 33a-36a. After a colloquy with the parties and the probation officer about a three-point reduction to Mr. Hughes's total offense level for acceptance of responsibility—and a correction to the court's initial computation of the Guidelines range—the court and parties agreed that the Guidelines range was 188-235 months. *Id.* The court considered the "plea agreement" and the sentence proposed therein; found no "unreasonable disparity between the sentence" in this and similar cases; and concluded that the recommended sentence "complie[d] ... with the spirit of the advisory ... Guidelines." Pet. App. 32a-33a; *see also* Pet. App. 47a (recommended sentence is "compatible with the advisory United States Sentencing Guidelines"). The court accepted the plea agreement and sentenced Mr. Hughes to 180 months in prison. Pet. App. 44a.

The Sentencing Commission Retroactively Reduces The Relevant Guidelines Range, But Mr. Hughes Is Denied The Opportunity To Seek A Reduction.

1. Less than two months after Mr. Hughes was sentenced, the Sentencing Commission adopted Amendment 782 to the Guidelines.

This amendment reduced the relevant offense level by two levels. *See* U.S.S.G. supp. app. C, amend. 782 (2016) (amendment effective Nov. 1, 2014). The Commission did so based on research, hearing testimony, and public comment demonstrating that longer

sentences were unnecessary to encourage defendants to plead guilty, and that reducing the overcrowded prison population through prospective and retroactive sentence reductions would enhance public safety by freeing up resources for crime prevention. *See id.* at 71-73 (amend. 782, Reason for Amendment).

The Commission subsequently determined to apply Amendment 782 retroactively to defendants sentenced before its adoption. *Id.*, amend. 788 (effective Nov. 1, 2014). The amendment therefore would reduce both the top and bottom of Mr. Hughes's sentencing range by more than three years. *Compare* Pet. App. 36a (range of 188-235 months), *with* Pet. App. 4a *and* Dkt. 94-2, Case No. 4:13-CR-043-HLM-WEJ-01 (N.D. Ga. Oct. 14, 2015) (revised range of 151-188 months).

2. Mr. Hughes filed a motion to reduce his sentence pursuant to 18 U.S.C. § 3582(c)(2). The district court denied the motion on the theory that his sentence was not "based on" a subsequently reduced sentencing range as required by § 3582(c)(2). Pet. App. 18a. The court gave controlling weight to the *Freeman* concurrence, and concluded that the concurrence's test hadn't been satisfied. Pet. App. 21a-25a. It reasoned that Mr. Hughes's "sentence was not linked or tied to the Sentencing Guidelines" because the plea agreement "does not mention an otherwise applicable Sentencing Guidelines range or Defendant's criminal history, and Defendant's criminal history category is not evident from the Agreement itself." Pet. App. 28a.

3. The Eleventh Circuit similarly found itself bound by the concurrence. It concluded that even

though no other Justice embraced the concurrence's rationale, that opinion still controlled because it "provides a legal standard that produces *results* with which a majority of the Court in *Freeman* would agree." Pet. App. 12a (emphasis added). Under that rule, it concluded, Mr. Hughes "is not eligible for a sentence reduction": The plea agreement "does not make any recommendation about a specific application of the Sentencing Guidelines, [it] does not calculate [Mr.] Hughes's range or discuss factors that must be used to determine that range, such as [Mr.] Hughes's criminal history[, n]or does it set the agreed-upon sentence within the applicable guideline range." Pet. App. 14a-15a.

SUMMARY OF THE ARGUMENT

I. With the issue unresolved by *Freeman* cleanly presented again, the Court can take a fresh look at when a defendant who pleads guilty under a C-type agreement is eligible for a sentence reduction under § 3582(c)(2).

A. Such a reduction is available when the sentence was "based on" the Guidelines. A "basis" is a "foundation" for, or "reasoning behind," a result. *New Oxford American Dictionary* 137 (3d ed. 2010); *Black's Law Dictionary* 180 (10th ed. 2014). That is language of causation. And under standard principles of causation, a Guidelines range is a basis for the sentence when it bears a reasonably close connection to the imposition of the sentence.

To assess the basis for the sentence, the first place to look is the rationale of the judge who imposed the

sentence. It is, after all, the judge who sentences. And, before accepting a C-type plea agreement, the judge must "evaluat[e] the recommended sentence in light of the defendant's applicable sentencing range." *Freeman*, 564 U.S. at 529 (plurality).

But the judge's rationale is not the only place to look. In this context, as in others, a result—the sentence—can have more than one cause. And the plea agreement also is a "foundation for the term of imprisonment to which the defendant is sentenced." *Id.* at 535 (concurrence). If the agreement specifies "that the basis for the specified term is a Guidelines sentencing range applicable to the offense to which the defendant pleaded guilty," *id.* at 539, then the Guidelines range is a basis for the sentence unless the district judge declines to rely on the Guidelines and imposes the sentence for non-Guidelines reasons.

B. A contrary rule would undermine the statute's goal of avoiding unwarranted sentencing disparities. It would severely limit, or indeed exclude, defendants with C-type agreements from seeking relief that similarly situated defendants may obtain. If such relief were ever available, it would only be because of the fortuity of language in a plea agreement over which defendants typically have little control. A rule like the Eleventh Circuit's thereby ignores the realities of plea bargaining and sentencing in the plea context, including the central role the Guidelines play in both processes.

C. Applying these principles, Mr. Hughes's sentence plainly was "based on" the Guidelines. The judge expressly relied on the Guidelines in approving

the plea agreement and imposing its recommended sentence.

II. A. If the Court does not garner a majority on that first question, it still should vacate the decision below. That is because the Eleventh Circuit erroneously treated the *Freeman* concurrence as binding precedent. A less-than-majority opinion only reflects the holding of the Court when it is the "narrowest grounds" on which a majority of Justices agree. *Marks*, 430 U.S. at 193. But that is only the case when, unlike here, a concurring opinion forms a logical subset of the plurality's rationale—i.e., when it "represent[s] a common denominator of the Court's *reasoning*." *King v. Palmer*, 950 F.2d 771, 781 (D.C. Cir. 1991) (en banc) (emphasis added).

B. Any other approach would be hopelessly indeterminate and would risk bestowing binding precedential force on decisions supported by a minority of the Court. Here, indeed, the Eleventh Circuit gave controlling force to a rationale that eight Justices rejected.

C. No opinion in *Freeman* can be said to provide a *Marks* "narrowest ground[]." Most fundamentally, the plurality and concurring opinions disagreed about the basic test for assessing when § 3582(c)(2) relief is available. In addition, not every defendant eligible for relief under the concurrence's approach would qualify under the plurality's rule. Thus, there is no logical subset, and the Eleventh Circuit erred in treating the concurrence as binding precedent.

D. Alternatively, the Court may ultimately conclude that the *Marks* "narrowest grounds" test has proven unworkable. This would mean returning to the rule that governed for well over a century: that no opinion establishes precedent unless it carries majority assent. Under that rule too, the decision below must be vacated because of the court's erroneous premise that it was bound to follow the *Freeman* concurrence.

ARGUMENT

I. Mr. Hughes Is Eligible For § 3582(c)(2) Relief Because His Sentence Was "Based On" A Sentencing Guidelines Range That Subsequently Was Lowered.

Mr. Hughes's sentence was based on a Guidelines range that subsequently was reduced. He therefore is eligible to apply for a sentence reduction, and the decision below should be reversed.

A. A defendant who enters into a C-type agreement is sentenced "based on" a Guidelines range when the Guidelines bear a reasonably close connection to the sentence.

1. The term "based on" invokes standard principles of causation.

To be eligible for a sentencing reduction under § 3582(c)(2), a defendant must have been "sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered." The key

term "based on" is not defined, and so carries "its ordinary meaning." *Taniguchi v. Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 566 (2012). The ordinary meaning of "based on" is rooted in principles of causation. Those principles, however, may have been given short shrift in the *Freeman* briefing; the petitioner said little about it, and the government offered only a flawed "legally binding" test that no Justice endorsed.

In plain terms, a result is "based on" conditions that underlie and support it. To "base" means "[t]o use (something) as the thing from which something else is developed," *Black's Law Dictionary* (2014), *supra*, at 180, i.e., "to make, form, or serve as a base for," *Merriam-Webster's Collegiate Dictionary* 101 (11th ed. 2014). A "base" or "basis," in turn, is "[a] fundamental principle; ... a foundation or starting point." *Black's Law Dictionary* (2014), *supra*, at 180 (basis). This can be "[a] basic or underlying element," or "[a] supporting part or layer." *American Heritage Dictionary* 148 (5th ed. 2016) (base). In short, it is "a main ingredient." *Merriam-Webster's Collegiate Dictionary*, *supra*, at 101 (base). In conceptual terms, a base is "[t]he fact, observation, or premise from which a reasoning process is begun." *American Heritage Dictionary* (2016), *supra*, at 148; *see New Oxford American Dictionary*, *supra*, at 136-37 (base is "conceptual structure"; basis is "the justification for or reasoning behind something").[3]

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[3] Contemporaneous dictionaries are to similar effect. *See, e.g.*, *Oxford American Dictionary* 50 (1980) ("basis" is "a foundation or support, a main principle"); *Black's Law Dictionary* 138

These definitions invoke common principles of causation. A "foundation" or "supporting part" is a necessary condition—in tort language, a but-for cause. *See generally* Dan B. Dobbs et al., *Dobbs' Law of Torts* § 186 (2d ed. 2017). That's how the Court understood the term in *Safeco Insurance Co. v. Burr*, which interpreted provisions of the Fair Credit Reporting Act. 551 U.S. 47, 52 (2007). The Court observed that, "[i]n common talk, the phrase 'based on' indicates a but-for causal relationship and thus a necessary logical condition." *Id.* at 63.

Elsewhere the Court has understood "based on" to denote necessary elements with a close connection to the result. *Saudi Arabia v. Nelson* interpreted the term "based upon" in the Foreign Sovereign Immunities Act (FSIA). 507 U.S. 349 (1993). Invoking dictionaries that define "base" as a "basis" or "foundation," the Court explained that an FSIA claim is "based on" those elements that entitle a plaintiff to relief, *id.* at 356-57—in other words, the "essentials" of the suit, *OBB Personenverkehr AG v. Sachs*, 136 S. Ct. 390, 395-97 (2015).

This language sounds in proximate cause. In the tort context, a cause bearing a "close connection" to the result is a "proximate" or legal cause. *Bank of Am. Corp. v. City of Miami*, 137 S. Ct. 1296, 1306 (2017).

(5th ed. 1979) ("basis" is a "[f]undamental principle"); *American Heritage Dictionary* 110 (1969) ("base" is "[t]he fact, observation, or premise from which a measurement or reasoning process is begun"); *Webster's Third New Int'l Dictionary* 180 (1966 ed.) ("base" is "foundation"; "main ingredient"; "basic principle").

As Prosser puts it, this is a cause that has a "reasonably close connection with" the result. W. Page Keeton et al., *Prosser and Keeton on Torts* 300 (5th ed. 1984) (*Prosser*); *accord* Restatement (Second) of Torts § 431 (1965) ("substantial factor in bringing about" the result). That concept mirrors definitions of "base" as an "important" or "main ... ingredient." *New Oxford American Dictionary*, *supra*, at 136; *Merriam-Webster's Collegiate Dictionary*, *supra*, at 101.

Important in this context, where the plea agreement and the judge's sentencing decision both are necessary to the sentence, an effect can be "based on" multiple causes. "The law of joint tortfeasors rests very largely upon recognition of the fact that each of two or more causes may be charged with a single result." *Prosser*, *supra*, at 268. "[A] given proximate cause need not be, and frequently is not, the exclusive proximate cause of harm." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 704 (2004); *see Staub v. Proctor Hosp.*, 562 U.S. 411, 420 (2011) (it is "common for injuries to have multiple proximate causes"). So long as a cause is not "too remote, purely contingent, or indirect," it is a proximate cause. *Staub*, 562 U.S. at 419; *see Prosser*, *supra*, at 268 ("If the defendant's conduct was a substantial factor in causing the plaintiff's injury, it follows that he will not be absolved from liability merely because other causes have contributed to the result ....").

The ordinary meaning of "based on" applies here. "Courts in applying criminal laws generally must follow the plain and unambiguous meaning of the statutory language." *United States v. Albertini*, 472 U.S. 675, 680 (1985). A sentence, therefore, is "based on"

those factors—those "principle[s]" or dat[a]," *Black's Law Dictionary* (2014), *supra*, at 180 (base)—that bear a "reasonably close connection" to the imposition of the sentence. *Prosser*, *supra*, at 300.

2. The sentencing judge's rationale and the parties' agreement each can show that the Guidelines bore a reasonably close connection to the sentence.

a. To identify the bases for a sentence, we begin with sentencing basics. Sentencing, of course, is performed by the judge. 18 U.S.C. § 3553(a) ("The court shall impose a sentence ...."). That is equally true when a judge sentences a defendant following a C-type plea agreement. *Freeman*, 564 U.S. at 535 (concurrence) ("No term of imprisonment—whether derived from a (C) agreement or otherwise—has legal effect until the court enters judgment imposing it.").

C-type agreements work as follows. As part of the plea agreement, the parties "recommend[]" a sentence to the judge. Fed. R. Crim. P. 11(c)(1)(C). That agreement "binds the court," but not until "the court accepts the plea agreement." *Id.*; *see Freeman*, 564 U.S. at 529-30 (plurality). The judge must separately determine both whether to accept the guilty plea and whether to accept the plea agreement (including the recommended sentence). *See United States v. Hyde*, 520 U.S. 670, 674 (1997) (faulting court of appeals for

"equat[ing] acceptance of the guilty plea with acceptance of the plea agreement").[4]

A plea hearing comes first. Accepting a plea entails placing the defendant under oath, determining that he understands his rights and how the plea procedure works, and ensuring that the plea is voluntary. Fed. R. Crim. P. 11(b). At that hearing, the judge may also accept the plea agreement. "[O]ften," however, the judge will accept only the guilty plea but defer a decision on the agreement (and thus the recommended sentence) until the sentencing hearing, by which time the court will have reviewed the presentence report. *Hyde*, 520 U.S. at 678; Fed. R. Crim. P. 11(c)(3)(A). When acceptance of the plea agreement is deferred, the court considers the agreement at sentencing alongside the Guidelines calculations set out in the report. That is what happened in *Hyde*, *Freeman*, and here. Pet. App. 32a-33a.

Regardless of when this decision occurs, the judge cannot accept the plea agreement without first finding that the agreed-upon sentence complies with the Guidelines, or explaining why the sentence is acceptable nonetheless:

> [T]he court may accept the agreement if the court is satisfied either that (1) the agreed sentence is within the applicable guideline

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[4] The Rules themselves recognize that accepting the plea and accepting the agreement are different; a defendant may withdraw a guilty plea "after the court accepts the plea, but before it imposes sentence ... if the court rejects [the] plea *agreement*." Fed. R. Crim. P. 11(d)(2)(A) (emphasis added).

> range; or (2)(A) the agreed sentence is outside the applicable guideline range for justifiable reasons; and (B) those reasons are set forth with specificity in the statement of reasons form.

U.S.S.G. § 6B1.2(c); *see also* 18 U.S.C. § 3553(a)(4) (requiring court to consider the Guidelines range before imposing sentence). The court is required to provide these reasons in open court "*at the time of sentencing.*" 18 U.S.C. § 3553(c) (emphasis added).

These sentencing basics indicate that there are two places to look for evidence of the basis for the sentence: the judge's rationale for imposing the sentence, and the parties' reasons for entering into the underlying agreement. We discuss each in turn.

b. The judge imposes the sentence. Accordingly, the judge's reasons for doing so necessarily reveal at least *a* basis—a proximate cause—of the sentence. Thus, to identify the causes of the sentence, one must look at "the analytic framework the judge used to determine the sentence or to approve the agreement." *Freeman*, 564 U.S. at 530 (plurality).

This approach is consistent with the plain meaning of "based on." *Supra* 14-16. A "basis" is the "justification for or reasoning behind something." *New Oxford American Dictionary*, *supra*, at 137; *see also Black's Law Dictionary* (2014), *supra*, at 180 ("[a] point, part, line, or quantity from which a reckoning or conclusion proceeds") (base); *American Heritage Dictionary* (2016), *supra*, at 148 ("fact, observation, or premise from which a reasoning process is begun")

(base). A court confronted with a § 3582(c)(2) motion should consult documents such as the statement of reasons and the sentencing transcript to understand the judge's rationale and determine whether the Guidelines bore a reasonably close connection to the recommended sentence. *See Freeman*, 564 U.S. at 529-31 (plurality).

So, for instance, the Guidelines will be a basis for a sentence when the district court "calculated" and "considered" the Guidelines sentencing range, then "expressed its independent judgment that the sentence was appropriate in light of the applicable Guidelines range." *Id.* at 530-31. The same will be true when a court approves the sentence after "finding it 'fair and reasonable' under the Guidelines." *United States v. Davis*, 825 F.3d 1014, 1017, 1023 (9th Cir. 2016) (en banc). In another example, the D.C. Circuit correctly concluded that a C-type sentence of 188 months (which fell below the Guidelines range of 210-260 months) was "based on" the Guidelines because the court calculated the Guidelines range, then explained that it "considered the sentence imposed 'sufficient' 'in view of the fact that the crack cocaine guidelines are what they are.'" *United States v. Epps*, 707 F.3d 337, 352 (D.C. Cir. 2013) (emphasis omitted). An even easier case is presented if the judge accepts the parties' agreed-upon sentence because it "is within the applicable guideline range." U.S.S.G. § 6B1.2(c)(1).

c. The Guidelines can be a basis for the sentence in another way too: when the parties' *agreement* is based on the Guidelines. Where C-type plea agreements are concerned, a sentence often will be "based

on" the agreement, because the agreement is a foundation for the sentence under the plain terms of Rule 11(c)(1)(C). *Freeman*, 564 U.S. at 535 (concurrence). If, therefore, the parties in their agreement "call for the defendant to be sentenced within a particular Guidelines sentencing range," *id.* at 538, or "make clear that the basis for the specified term is a Guidelines sentencing range," *id.* at 539, then the Guidelines range will be a basis for the sentence—absent a decision by the court to reject the parties' reliance on the Guidelines and to base the sentence on non-Guidelines reasons, *infra* 27-28. Similarly, statements in the plea agreement establishing that the parties derived the term of imprisonment from the Guidelines range can be evidence that the court, in approving the sentence, based its approval on the same calculations. Courts applying the approach of the *Freeman* plurality have looked to the agreement for this purpose. *Davis*, 825 F.3d at 1027-28; *Epps*, 707 F.3d at 352.

Considering the parties' agreement ensures that, when the parties have tied their recommended sentence to a Guidelines range that subsequently is lowered, a corresponding reduction is available so as to "enforce[] the agreement's terms." *Freeman*, 564 U.S. at 540 (concurrence). The agreement can serve the important function of filling gaps when the sentencing transcript is opaque (or lost), thereby ensuring that the defendant does not lose the ability to seek a sentence reduction merely because the record is less than clear. Take, for instance, a case where the judge approves an out-of-Guidelines sentence. If the judge is silent about whether he is looking to the Guidelines themselves to justify the sentence, or rejecting their

use altogether, the agreement may clarify matters. This does not call for a "free-ranging search through the parties' negotiating history." *Id.* at 538. But, when the terms of the parties' agreement show that the sentencing recommendation was tied to the Guidelines, and the judge has not rejected the parties' rationale before imposing the sentence, the resulting sentence is fairly said to be "based on" the Guidelines range.

The agreement, however, cannot be the end of the analysis. The *Freeman* dissent thought that it was, reasoning that although the judge is "the one who imposes the sentence," *id.* at 547, "the sentence ... is based on the agreement, not the Sentencing Guidelines," *id.* at 544. It focused on the fact that, "*[a]t the moment of sentencing*, the court simply implements the terms of the agreement it has already accepted." *Id.* at 545 (emphasis added) (quoting *id.* at 535-36 (concurrence)). But a proximate cause need not be the *last* cause; there can be multiple legal causes at different points in time. *See Staub*, 562 U.S. at 419-20; Restatement (Second) of Torts § 430 cmt. d. And, for the reasons described above (at 18-19), it is artificial to focus on the moment of sentencing to the exclusion of the judge's approval of the sentence. Those steps often occur in tandem, as they did here. The district court therefore "considered the allegations of the presentence report, ... the plea agreement, [and] the sentencing guidelines" before accepting that agreement, Pet. App. 32a-33a—then, just moments later, reviewed Guidelines calculations with the parties and again referenced Guidelines considerations before imposing a sentence it deemed "compatible with the advisory United States Sentencing Guidelines." Pet. App. 47a. The judge was not thinking exclusively

about the agreement, rather than the Guidelines, when he imposed that sentence. Were that so, it would suggest that the lengthy analysis he undertook—that he was *required* to undertake, *see* 18 U.S.C. § 3553(a)(4); U.S.S.G. § 6B1.2(c)—was an empty gesture.

Indeed, if the moment of sentencing were all that mattered, it would mean that a sentence imposed pursuant to a C-type agreement *never* is "based on" the Guidelines. That conclusion would be at odds with the Sentencing Act itself. The statute puts limits on the parties' ability to appeal a sentence imposed pursuant to a C-type agreement. But it *preserves* the parties' ability to appeal such a sentence on the ground that it "was imposed as a result of an incorrect application of the sentencing guidelines." 18 U.S.C. § 3742(a)(2), (b)(2), (c)(1)-(2); *see, e.g.*, *United States v. Smith*, 918 F.2d 664, 668-69 (6th Cir. 1990) (permitting a defendant to appeal his C-type sentence as involving an "incorrect application of the sentencing guidelines"). If the Guidelines weren't being applied, there would be no incorrect application of the Guidelines to appeal.

3. The Guidelines often but not always will bear a reasonably close connection to the sentence of a C-type defendant.

a. For the reasons just set forth, C-type sentences often—but not always—will be "based on" the Guidelines.

This should not be surprising. The Guidelines are "the starting point and the initial benchmark" of all

federal sentencing. *Gall v. United States*, 552 U.S. 38, 49 (2007); *see Freeman*, 564 U.S. at 529 (plurality). Accordingly, the parties bargain against the backdrop of the applicable Guidelines range. The Principles of Federal Prosecution instruct federal prosecutors to use the Guidelines "as a touchstone," and to "seek sentences that reflect an appropriate balance of the factors set forth in § 3553"—which, "[i]n the typical case," will be "reflected by the applicable guideline range." U.S. Dep't of Justice, *U.S. Attorneys' Manual* § 9-27.730(C)(1) (2017). This is true in both litigated and pleaded cases. The U.S. Attorneys' Manual divides plea agreements (including C-type agreements) into two groups: agreed-upon sentences within the Guidelines range, and sentences that "seek to depart from the guidelines." *Id.* § 9-27.400. Either way, the Guidelines are the starting point. And when a prosecutor wants to depart from the Guidelines range in a plea agreement, that departure is supposed to "be accomplished through appropriate Sentencing Guideline provisions." *Id.* § 9-16.300. The fact of bargaining in the shadow of the Guidelines may not be dispositive. *Freeman*, 564 U.S. at 537-38 (concurrence). But it underscores the important role the Guidelines play even in pleaded cases.

Indeed, Congress deliberately preserved that role, in ways that the *Freeman* briefing may not have made clear. When Congress was considering the Sentencing Reform Act, "critics expressed the concern" that prosecutors could "circumvent the guidelines recommendation" through plea bargaining. S. Rep. No. 98-225, at 63. Congress responded by ensuring that sentences arising out of plea agreements—like other sen-

tences—would be grounded in the Guidelines. It directed the Sentencing Commission to issue "policy statements for consideration by Federal judges in deciding whether to accept a plea agreement." *Id.*; *see* 28 U.S.C. § 994(a)(2)(E) (authorizing these policy statements). "This guidance," Congress believed, would "assure that judges can examine plea agreements to make certain that prosecutors have not used plea bargaining to undermine the sentencing guidelines." S. Rep. No. 98-225, at 63; *see also* 18 U.S.C. § 3553(a)(4). The Sentencing Commission responded by promulgating U.S.S.G. § 6B1.2, discussed above (at 18-19). That provision demonstrates that the court at sentencing does not "simply implement[] the terms of the agreement it has already accepted." *Freeman*, 564 U.S. at 535-36 (concurrence). The Guidelines are very much in the mind of the court at the moment of sentencing.

Similarly, the Federal Rules make clear that the judge has an "*obligation* to calculate the applicable sentencing-guideline range and to consider that range [and] possible departures under the Sentencing Guidelines." Fed. R. Crim. P. 11(b)(1)(M) (emphasis added). And this "obligation" is so critical that the judge must explain it to the defendant before accepting a guilty plea. *Id.*

Accordingly, the judge often will issue a sentence that depends upon and bears a "reasonably close connection" to the Guidelines. *Prosser*, *supra*, at 300. That is precisely how the Guidelines are intended to operate—as an "anchor" for the sentencing analysis. *Peugh*, 569 U.S. at 541 ("The post-*Booker* federal sen-

tencing scheme aims to achieve uniformity by ensuring that sentencing decisions are anchored by the Guidelines and that they remain a meaningful benchmark through the process of appellate review."); *see generally* Mark W. Bennett, *Confronting Cognitive 'Anchoring Effect' and 'Blind Spot' Biases in Federal Sentencing: A Modest Solution For Reforming a Fundamental Flaw*, 104 J. Crim. L. & Criminology 489, 523-29 (2014).

b. "Even where the judge varies from the recommended range," *Freeman*, 564 U.S. at 529 (plurality), the sentence often will be "based on" the Guidelines. That is, "if the judge uses the sentencing range as the beginning point to explain the decision to deviate from it, then the Guidelines are in a real sense a basis for the sentence." *Id.* Whether a sentence is inside or outside of the applicable Guidelines range, it is "based on" that range if the judge used the Guidelines range to justify the sentence. Under those circumstances, the Guidelines range is a "necessary logical condition," *Safeco*, 551 U.S. at 63, for the sentence.

The Guidelines themselves indicate that an outside-the-Guidelines sentence may be "based on" the Guidelines. If sentences outside the Guidelines range were never based on the Guidelines, then relief for such sentences never would be available under § 3582(c)(2). But the Guidelines are clear that a defendant whose sentence falls outside the recommended Guidelines range *is* eligible for a reduced sentence under § 3582(c)(2) subject to certain limitations. U.S.S.G. § 1B1.10(b)(2) & n.3.

c. A C-type sentence will not, however, *always* be based on the Guidelines. *See Freeman*, 564 U.S. at 534 (plurality). The post-*Booker* scheme allows a judge to impose a sentence for non-Guidelines reasons. *Peugh*, 569 U.S. at 541-42; *see, e.g.*, *Gall*, 552 U.S. at 43-44, 58-59 (approving district court's decision to impose below-Guidelines sentence for non-Guidelines reasons, including the defendant's post-offense rehabilitation). Thus, although judges "must *begin* their analysis with the Guidelines," they may impose a non-Guidelines sentence based on non-Guidelines factors, so long as "the justification is sufficiently compelling to support the degree of the variance." *Id.* at 50 & n.6 (quoting 18 U.S.C. § 3553(a)(1)) (emphasis added). This means that there will be situations when the sentence is not based on the Guidelines.

That will be the case, for instance, when the judge merely consults the Guidelines, but then goes on to impose the sentence for wholly non-Guidelines reasons. Having imposed the sentence *despite* the Guidelines, they are not a basis for the sentence. *See Davis*, 825 F.3d at 1023; *see also Safeco*, 551 U.S. at 63-64. The same will be true when the *agreement* calls for a Guidelines-based sentence, but the judge justifies and then imposes the sentence on non-Guidelines grounds. Under those circumstances, the parties' Guidelines-based rationale did not cause the sentence that the judge ultimately imposed. Whether this is thought of as a lack of sufficient legal cause, *see supra* 15-16, or akin to "an intervening cause breaking the chain of causation," *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639, 659 (2008), the basis for the sentence is the judge's reasons and rationale, not the Guidelines.

In *United States v. Garrett*, for example, the judge noted his disagreement with the Guidelines range for a crack cocaine offense. 758 F.3d 749, 751 (6th Cir. 2014). He nevertheless accepted the recommended within-Guidelines sentence based on his independent view that such a sentence was appropriate "for purposes of deterrence." *Id.* at 752. That sentence is not "based on" the applicable Guidelines range: As the court of appeals observed, "If we take the district court at its word, the court does not appear to have based Garrett's sentence on the crack-cocaine guidelines." *Id.* at 755.[5] For similar reasons, if the judge and parties disagree on the proper calculation of the Guidelines range, the sentence is "based on" the range calculated by the judge, not the parties. *E.g.*, *United States v. Leonard*, 844 F.3d 102, 110 (2d Cir. 2016); *see United States v. Duvall*, 705 F.3d 479, 487-88 (D.C. Cir. 2013) (Williams, J., concurring in judgment).

B. Foreclosing or severely limiting C-type plea recipients' eligibility for relief under § 3582(c)(2) is inconsistent with the Sentencing Act and likely to lead to significant inequities.

1. "There is no reason to deny § 3582(c)(2) relief to defendants who linger in prison pursuant to sentences that would not have been imposed but for a

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[5] The court of appeals believed itself bound by the *Freeman* concurrence, however, and therefore concluded (incorrectly) that the sentence *was* based on the Guidelines due to the language of the agreement, notwithstanding the judge's rejection of that rationale. 758 F.3d at 754-55.

since-rejected, excessive range." *Freeman*, 564 U.S. at 526 (plurality). And there is no statutory basis for distinguishing between defendants who enter C-type agreements and those who do not. C-type plea deals were well established when Congress enacted § 3582(c)(2). *Id.* at 537 (concurrence). If Congress had wanted to exclude defendants who enter C-type plea deals from the benefits of § 3582, it could have done so. And there is strong textual evidence that Congress did not intend to do so. Congress knew how to exclude C-type deals from other categories of statutory relief. It barred defendants whose C-type agreements provide a specific sentence from appealing their sentences except in limited circumstances. *See* 18 U.S.C. § 3742(c); *supra* 23. But Congress has not similarly excluded C-type agreements from relief under § 3582(c)(2). Thus, "Congress knew how to draft [an] ... exemption in [the statute] when it wanted to," *City of Chicago v. Envtl. Def. Fund*, 511 U.S. 328, 338 (1994) (internal quotation marks omitted), and its decision not to do so here is telling.

2. There is good reason that Congress did not exclude C-type plea recipients from relief under § 3582(c)(2); doing so would have undermined the statute's purpose. Section 3582(c)(2) is a "safety valve" intended to "assure the availability of specific review and reduction of a term of imprisonment ... to respond to changes in the guidelines." S. Rep. No. 98-225, at 121. It is another way in which the Sentencing Reform Act effectuates one of its most basic purposes—to ensure that "those who commit crimes of similar severity under similar conditions receive similar sentences." *Freeman*, 564 U.S. at 533 (plurality);

see 18 U.S.C. § 3553(a)(6). Eliminating or significantly limiting its application to an entire category of plea agreements would arbitrarily distinguish between similarly situated defendants—thereby causing the very disparities the statute was designed to alleviate.

Imagine three equally culpable co-defendants charged with the same offense. Their offense levels, criminal history categories, and sentencing ranges under the Guidelines are the same. One goes to trial and is convicted. The second enters a nonbinding plea agreement under Rule 11(c)(1)(B), which recommends a sentence at the low end of the Guidelines range without explicitly invoking the Guidelines. The third enters a C-type agreement that does likewise. The judge gives each defendant the same sentence, indicating her satisfaction that the sentences conform to the Guidelines. If the Commission determines that a change should be applied retroactively to the relevant Guideline, there is no equitable basis to treat these defendants differently in their eligibility for a sentence reduction. They are "defendants with similar records who have been found guilty of similar conduct," and should therefore serve similar terms of imprisonment. 18 U.S.C. § 3553(a)(6).

A contrary rule also would create unwarranted disparities between defendants who enter into C-type agreements before and after a retroactive Guidelines amendment. "[R]emov[ing] Rule 11 pleas from the reach of § 3582 ... would leave defendants who pled guilty before the effective date of the amendment with higher sentences than those who pled guilty after-

ward because the post-amendment pleas and plea negotiations are based on the lower, modified sentencing ranges." *United States v. Cobb*, 584 F.3d 979, 985 (10th Cir. 2009). That is precisely the sort of disparity that a retroactive change is meant to avoid. *Supra* 3-4.

3. The *Freeman* concurrence would limit this inequity by leaving the door open to relief under certain circumstances: when the agreement (1) "call[s] for the defendant to be sentenced within a particular Guidelines sentencing range," or (2) "provide[s] for a specific term of imprisonment—such as a number of months" and "make[s] clear" that the foundation for the agreed-upon sentence was the Guidelines. 564 U.S. at 538-39. The effect of this rule, however, is to "treat the Guidelines differently in similar proceedings," thereby leading "to unfair results and considerable administrative challenges." *Dillon v. United States*, 560 U.S. 817, 829-30 (2010).

As a practical matter, such a rule systematically disadvantages defendants whose plea agreements are not reduced to writing. *E.g.*, *United States v. Graham*, 704 F.3d 1275, 1278 n.5 (10th Cir. 2013); *see* Defender Services Office, *Status of Plea Agreements 2010-2016*, https://tinyurl.com/pleastatistics (last visited Jan. 20, 2018). That fact alone will arbitrarily disqualify deserving applicants from relief because the Guidelines basis for their sentence will not be "evident from the agreement itself." *Freeman*, 564 U.S. at 539 (concurrence).

Worse still, this rule would make a defendant's eligibility for § 3582(c)(2) relief "depend in large part

upon the fortuity of whether a particular United States Attorney's Office includes" language making an explicit reference to the Guidelines "in plea agreements as a matter of course." *United States v. Hamdi*, 432 F.3d 115, 126 (2d Cir. 2005). Individual U.S. Attorney's Offices—and even individual prosecutors—often present defendants with form agreements on a take-it-or-leave-it basis. And at least some offices have modified those forms to preclude the possibility of any relief under the *Freeman* concurrence's rule. Elevating that form over the substance of what actually drove a particular defendant's sentencing would create the kind of "arbitrary disparity," *id.*, that should be unacceptable in criminal sentencing.

And the results under this test have been incongruous, denying § 3582(c)(2) relief to defendants whose sentences plainly were imposed because of the Guidelines. In *United States v. Dixon*, for example, the district court denied relief because the written agreement did not "expressly link" the Guidelines range to the recommended sentence. 687 F.3d 356, 360 (7th Cir. 2012). The court of appeals candidly acknowledged that the recommended sentence was, in fact, based on the Guidelines range. The prosecutor had stated at the sentencing hearing that the parties arrived at their recommended range by calculating "a one-third to one-half discount from the bottom of the applicable Guideline range." *Id.* at 361. As the court of appeals noted, "[i]t is hard to believe that these assurances were not relevant, perhaps even decisive, in the judge's decision to accept the binding plea agreement." *Id.* Nevertheless, the court denied relief. It felt compelled to follow the *Freeman* concurrence under which, it reasoned, anything "beyond the scope of the

written agreement" must be disregarded. *Id.*; *cf. United States v. Rivera-Martinez*, 665 F.3d 344, 349 (1st Cir. 2011) (insufficient that the agreement identified "some guideline components (including a total offense level) as well as a specified drug quantity").

4. It is no answer to say that a defendant can control his fate by insisting on an explicit Guidelines invocation in his plea deal. Br. in Opp. 14. That argument is cold comfort to the many defendants who already have been sentenced following C-type agreements. Section 3582(c)(2) is, by its very nature, intended to protect the interests of those already serving prison terms. Nor is this of any benefit to defendants who do not have written plea agreements. *Supra* 31.

Moreover, it blinks reality to suggest that defendants simply can insist on explicit Guidelines references in their plea agreements. Under the sentencing Guidelines and mandatory minimum laws, prosecutors wield tremendous power: A prosecutor can control a defendant's probable sentence through charging decisions. *See* Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 Stan. L. Rev. 869, 877, 886 (2009). Defendants often feel compelled to accept pleas on the government's terms, particularly given the possible alternative: the threat of more serious charges if they elect to go to trial. *See id.* at 886-87. And few will go to the mat, even if they could, to insist on a term that grants them a mere shot at a lower sentence on the off chance the Sentencing Commission lowers their Guidelines range.

5. Affording the benefits of § 3582(c)(2) to defendants subject to C-type agreements does not deprive the government of the benefit of any bargain. *Contra Freeman*, 564 U.S. at 551 (dissent). When a Guidelines range that drove the agreement (and the judge's acceptance of it) is subsequently reduced, this indicates that, in the Commission's current judgment, the government was bargaining with a chip it should not have had.

Likewise, permitting such a defendant to seek relief under § 3582 does not enable a judge to "rewrite" the parties' agreement. *Id.* at 536 (concurrence); *id.* at 545 (dissent). Plea agreements are written against the backdrop of § 3582(c)(2); it is implicit that the agreed-upon sentence might later be reduced in the ways the statute contemplates. Accordingly, § 3582(c)(2) does not allow the court to rewrite the plea agreement any more than it impinges on finality, which it does only modestly. Congress provided "a limited adjustment" available "to a limited class of prisoners." *Dillon*, 560 U.S. at 825-26; *see* U.S.S.G. § 1B1.10(a)(3), (b)(1). It has not authorized retroactive revisions of plea agreements, but rather "permit[ted] the district court to revisit a prior sentence to whatever extent the sentencing range in question was a relevant part of the analytic framework the judge used ... to approve the agreement." *Freeman*, 564 U.S. at 530 (plurality). And eligibility does not equal a reduction; a judge has discretion to deny relief based on the § 3553(a) factors and Commission policy statements. *Id.* at 531-32; *id.* at 541 (concurrence).

Absent an explicit waiver of § 3582(c)(2) relief in the agreement, it makes little sense to deprive C-type

plea defendants (but not others) of the benefit of a retroactive change in that sentencing range. Here, for example, nothing in Mr. Hughes's fully integrated agreement indicated that he intended to waive eligibility for a retroactive reduction for which he otherwise would have been eligible. *See* Pet. App. 66a ("[t]here are no other agreements, promises, representations or understandings between" the parties); *compare* Pet. App. 51a-52a, 63a (waiving appellate rights). It is inappropriate to presume that a defendant bargained away his eligibility for a future sentence reduction. Sub silentio waivers generally won't be read into even *ordinary* contracts. 11 *Williston on Contracts* § 31:4 (4th ed.). And a plea agreement, of course, is no ordinary contract; indeed, it "necessarily implicates the integrity of the criminal justice system." *United States v. Cvijanovich*, 556 F.3d 857, 862 (8th Cir. 2009). A waiver of the right to appeal, for example, must be express and acknowledged by the defendant on the record. Fed. R. Crim. P. 11(b)(1)(N). Courts should be similarly wary of reading into an agreement a silent waiver of § 3582(c)(2) relief.

C. Mr. Hughes is eligible for relief under § 3582(c)(2).

Under these principles, Mr. Hughes's sentence was "based on" the Guidelines. The Guidelines were considered throughout Mr. Hughes's plea bargaining and sentencing process. And every indication is that the applicable Guidelines range was closely connected to the sentence Mr. Hughes received.

The plea agreement signaled that the judge would evaluate the stipulated sentence in light of the Guidelines range. It expressly indicated that the judge would consider the Sentencing Guidelines before imposing the sentence. Pet. App. 54a. The parties further contemplated that the sentence would involve an "application of the Sentencing Guidelines." Pet. App. 56a ("[T]he government also reserves the right to make recommendations regarding application of the Sentencing Guidelines."); *see also* Pet. App. 58a ("Pursuant to § 1B1.8 of the Sentencing Guidelines, the Government agrees that any self-incriminating information that was previously unknown to the Government ... will not be used in determining the applicable sentencing guideline range ....").

The district court then accepted the plea agreement and sentenced Mr. Hughes to the parties' recommended sentence. In so doing, the judge expressly "considered ... the sentencing guidelines" and determined that the agreement "complie[d]" with their "spirit." Pet. App. 32a-33a. He indicated that he had read and considered the presentence report, which included a calculation of the applicable Guidelines range as required by Rule 32(d)(1). Pet. App. 33a. He also considered the parties' agreement. *Id.* The judge then undertook the calculations that the Guidelines require. He calculated a total offense level of 31 and a criminal history category of VI. Pet. App. 33a-36a. Attorneys for Mr. Hughes and the government weighed in on these calculations, as did the probation officer. *Id.* On that basis, the court computed a sentencing range under the Sentencing Guidelines—188 to 235 months. Pet. App. 36a.

In imposing sentence, the court referred back expressly to the same considerations that motivated its approval of the plea agreement. Pet. App. 47a. And in so doing, the court "conclude[d] and f[ound] that it ha[d] imposed a reasonable sentence in this case compatible with the advisory United States Sentencing Guidelines but in accordance with the mandatory matters the Court is required to consider in ultimately determining a sentence." *Id.* It gave no indication that 180 months was the sentence it would have arrived at irrespective of the Guidelines range, or that factors other than the Guidelines range justified the result. *See Freeman*, 564 U.S. at 530-31 (plurality) (sentence was "based on" the Guidelines range where the court "expressed its independent judgment that the sentence was appropriate in light of the applicable Guidelines range"); *Epps*, 707 F.3d at 352 (sentence was "based on" the guidelines where the judge imposed a sentence "in view of the fact that the crack cocaine guidelines are what they are" (emphasis omitted)). Accordingly, the Eleventh Circuit erred in foreclosing Mr. Hughes from seeking relief under § 3582(c)(2).

II. The Court Of Appeals Erred By Treating The Single-Justice Concurrence In *Freeman* As Binding Precedent.

The simplest resolution of this case is to reach a majority on the question left unresolved by *Freeman*. But if the Court does not do so, the decision below still must be vacated because the Eleventh Circuit erroneously believed that it was bound by the *Freeman* concurrence. When no single opinion captures a majority,

the decision has binding effect only if, among the "position[s] taken by those Members who concurred in the judgment[]," there is a "narrowest ground[]" supporting the judgment with which a majority of the Court agrees. *Marks*, 430 U.S. at 193 (internal quotation marks omitted). An opinion embodies a "narrowest ground[]" only when it is a "logical subset" of enough opinions to form a majority. *King*, 950 F.2d at 780-81. The *Freeman* concurrence, however, is not a logical subset of the plurality; the opinions rest on different theories and share no rationale.

The Eleventh Circuit's alternative approach invites confusion. It would require a court to imagine the *results* dictated by each separate opinion in a variety of hypothetical cases. Predicting how *future* cases might come out stands the judicial role on its head, and is certain to generate disagreement and dissent. But even if that approach were correct, the decision below still was wrong; it mistakenly concluded that "whenever Justice Sotomayor's opinion would permit a sentence reduction, the plurality opinion would as well." Pet. App. 12a-13a. For these reasons too, the decision below must be vacated.

A. An opinion constitutes the "narrowest grounds" under *Marks* when it represents a logical subset of reasoning embraced by a majority of the Court.

1. *Marks* wasn't always the rule. That relatively recent decision represented a limited departure from how the Court historically has established precedent: by issuing opinions joined by a majority of Justices.

Early in the Court's history, each Justice issued a separate opinion, even when they all agreed on the proper disposition of a case. Those seriatim opinions often "varied so greatly in their reasoning and conclusions that it was difficult to see who had 'won' and 'why.'" Melvin I. Urofsky, *Dissent and the Supreme Court: Its Role in the Court's History and the Nation's Constitutional Dialogue* 6 (2015). Chief Justice Marshall eventually "institutionalized" the practice of offering a precedential "opinion of the Court," *id.* at 6, and "[f]or the first time, the Court as a judicial unit had been committed to an opinion—a ratio decidendi—in support of its judgments." Karl M. ZoBell, *Division of Opinion in the Supreme Court: A History of Judicial Disintegration*, 44 Cornell L.Q. 186, 193 (1959).

Thus, historically the rule has been that if no "opinion[] was accepted by a majority of the court," then "statements therein are not binding." *Alaska v. Troy*, 258 U.S. 101, 111 (1922); *cf. United States v. Pink*, 315 U.S. 203, 216 (1942) (in an earlier affirmance by an equally divided Court, "the lack of an agreement by a majority of the Court on the principles of law involved prevents [a judgment] from being an authoritative determination for other cases"). "Many pre-*Marks* authorities and cases doubted the precedential value of opinions without a majority rationale or majority agreement on a rule of decision." Richard M. Re, *Beyond The* Marks *Rule* 5 n.21 (Jan. 5, 2018), https://tinyurl.com/y8wwqnnn (last visited Jan. 20, 2018); *see* Eugene Wambaugh, *The Study of Cases* § 48 (2d ed. 1894) (discussing practices at common law; "Even when all of the judges concur in the result,

the value of the case as an authority may be diminished and almost wholly destroyed by the fact that the reasons given by the several judges differ materially."); Henry C. Black, *Handbook on the Law of Judicial Precedents* 135-37 (1912). In short, the general rule was that without a majority opinion, there was no precedent binding on lower courts.[6]

2. In the 1970s, the waters were muddied. In *Marks*, the Court addressed how to proceed "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices." 430 U.S. at 193. Under those circumstances, "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment[] on the narrowest grounds." *Id.* (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976) (opinion of Stewart, Powell, and Stevens, JJ.)).

Marks refined the historical norm, and its circumstances make clear that the refinement was modest. It assessed the precedential effect of a prior, fragmented decision in which opinions sufficient to form a majority fit together like Russian dolls; the rationale of one opinion nested entirely within the broader rationale of another. Specifically, *Marks* considered whether a plurality opinion in *Memoirs v. Massachusetts*, 383 U.S. 413 (1966), "authoritatively stated the law in effect." *Marks*, 430 U.S. at 191. At

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[6] *This* Court, of course, is not bound by *Marks*: It "is free to reconsider or refine or tweak its own precedents—including splintered precedents." *United States v. Duvall*, 740 F.3d 604, 611 n.2 (D.C. Cir. 2013) (Kavanaugh, J., concurring in the denial of rehearing en banc).

issue in *Memoirs* was the extent to which sexually explicit material is constitutionally protected. 383 U.S. at 415. A majority of Justices voted to reverse a declaration that the book in question was obscene. Two Justices concluded that "the First Amendment provides an *absolute* shield against governmental action aimed at suppressing obscenity," and a plurality of three Justices wrote that obscenity cases could proceed only as to material "utterly without redeeming social value." *Marks*, 430 U.S. at 193-94 (emphasis added).[7]

Among the opinions supporting the judgment, the three-Justice plurality authored by Justice Brennan represented the "narrowest grounds" on which a majority of the Court concurred. *Id.* at 193. That is because the plurality's reasoning was fully encompassed within two other Justices' absolutist positions: "Because Justices Black and Douglas had to agree, as a logical consequence of their own position, with the plurality's view that anything with redeeming social value is not obscene, the plurality of three in effect spoke for five Justices ...." *King*, 950 F.2d at 781; Ryan C. Williams, *Questioning* Marks*: Plurality Decisions and Precedential Constraint*, 69 Stan. L. Rev. 795, 840 (2017) ("[T]reating Justice Brennan's opinion [in *Memoirs*] as 'controlling' was fully consistent with requiring a majority consensus among the concurring Justices for binding precedential force to attach."). The same was true in *Gregg*, from which *Marks* drew its "narrowest grounds" formulation. There, similar to

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[7] Justice Stewart provided a sixth vote for the judgment "based on his view that only 'hardcore pornography' may be suppressed." 430 U.S. at 193 (quoting *Memoirs*, 383 U.S. at 421).

Marks, the Court was interpreting an underlying decision in which some Justices held a law to be facially unconstitutional and others thought it constitutional in certain applications. 428 U.S. at 169 n.15; *see King*, 950 F.2d at 781 (describing splintered opinions in *Furman v. Georgia*, 408 U.S. 238 (1972), that the Court addressed in *Gregg*).

3. Thus, both *Marks* and *Gregg* addressed underlying decisions in which one opinion was a logical subset of another. That is no accident. "*Marks* is workable—one opinion can be meaningfully regarded as 'narrower' than another—only when one opinion is a logical subset of other, broader opinions." *King*, 950 F.2d at 781. That is because when "one opinion supporting the judgment does not fit entirely within a broader circle drawn by the others," a contrary rule would "turn a single opinion that lacks majority support into national law." *Id.* at 782. "[I]t surely cannot be proper to endow that approach with controlling force ...." *Id.*; *see Davis*, 825 F.3d at 1014; *United States v. Carrizales-Toledo*, 454 F.3d 1142, 1151 (10th Cir. 2006).

Under the logical subset test, "the narrowest opinion must represent a common denominator of the Court's reasoning; it must embody a position implicitly approved by at least five Justices who support the judgment." *King*, 950 F.2d at 781. For instance, in a case with two opinions supporting the judgment (embodying Rule A and Rule B), the inquiry is simply whether Rule B calls for relief only "where Rule A does," and "calls for relief in no other cases." *Duvall*, 740 F.3d at 620 (Williams, J.). In such a case, "Rule B is clearly 'narrower' than Rule A" and falls within the

ambit of *Marks*. *Id.* If, however, the rules only "partially overlap[]," then no opinion of the Court controls. *Id.* at 618-19. Instead, a lower court is bound only by the "specific result," and must "consider which of the rationales set forth in the varying opinions is most persuasive" and apply that reasoning. *Davis*, 825 F.3d at 1022, 1026.

Determining when one opinion is a logical subset of another can be straightforward. Take, for example, *Caldwell v. Mississippi*, 472 U.S. 320 (1985). There, a prosecutor had made comments to the jury about the role of appellate review in capital sentencing. The plurality concluded that the comments rendered the sentence unconstitutional for two reasons: The comments inaccurately described the appellate process in a way that diminished the jury's sense of responsibility, and any reference to appellate review was "wholly irrelevant" to sentencing. *Id.* at 336 (plurality opinion). In a separate opinion that the Court later deemed controlling under *Marks*, *see Romano v. Oklahoma*, 512 U.S. 1, 9 (1994), Justice O'Connor concurred because she agreed with one of those two reasons—she thought the comments "were inaccurate and misleading." *Caldwell*, 472 U.S. at 322. She disagreed, however, that the comments were "irrelevant," and believed that providing the jury with accurate information about appellate procedures was constitutionally permissible. *Id.* at 336. Because the concurrence fully embraced one of the plurality's two stated rationales, Justice O'Connor's opinion was a logical subset.

In short, the logical subset approach provides a viable method for identifying the "narrowest grounds"

of a fractured decision. It is sufficiently certain in application; a lower court need only ask whether the rationale of one opinion is fully subsumed by that of another. If so, the narrower opinion controls; if not, there is no controlling precedent. This test also properly accounts for common situations that reflect reasoning shared by a majority of the Court, such as where overlapping opinions would invalidate a statute on facial and as-applied grounds, or (as in *Caldwell*) a narrower opinion would afford relief for some (but not all) rationales embraced by the plurality. *See United States v. Johnson*, 467 F.3d 56, 64 (1st Cir. 2006) ("when two opinions reach the same result in a given case, but one opinion reaches that result for less sweeping reasons than the other," it "makes ... sense" to afford precedential weight to the less sweeping opinion). And this approach is faithful to the Court's command that "[w]hen an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result" that have binding effect. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 67 (1996). It properly recognizes that this Court's holdings arise from the intersection of the judgment in a case and the rationale that supports it.

B. The test adopted by the decision below is unworkable, and would transform theories rejected by the majority of the Court into binding precedent.

Any other approach to identifying a majority rationale where this Court has not stated one "is inherently confusing and in fact indeterminate," requiring

"guesswork as to the distribution of situations governed" by competing rules. *Duvall*, 740 F.3d at 618 (Williams, J.). That is plain from the decision below.

The Eleventh Circuit rejected the logical subset test. Pet. App. 10a. It refused to consider whether the opinions supporting the judgment share common reasoning. *Id.* (concluding that a "narrow focus on the *rationale* of the opinions in *Freeman* is misplaced" (emphasis added)). Instead, the Eleventh Circuit asked whether the concurrence "produces *results* with which a majority of the Court ... would agree." Pet. App. 12a (emphasis added). Under this approach, such bare results—bereft of any common rationale—wouldn't even have to be endorsed by a majority of Justices in the underlying case. Rather, for an opinion to be "narrowest," it would need only "consistently produce results" with which a majority would agree. Pet. App. 7a. The court's premise was that "it is the ultimate 'vote' of five Justices"—not a shared rationale—"that is important in determining the binding effect of a splintered Supreme Court opinion." Pet. App. 12a (internal quotation marks omitted).

That approach ignores the fundamental precept that precedent is established by marrying up a common rationale and a common result. *Seminole Tribe*, 517 U.S. at 67; *see also Cty. of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 668 (1989) (Kennedy, J., concurring in judgment in part and dissenting in part) ("As a general rule, the principle of stare decisis directs us to adhere not only to the holdings of our prior cases, but also to their explications of the governing rules of law."). When "the principles of law involved" in a case have not "been agreed upon by

a majority of the court," that disagreement "prevents the case from becoming an authority for the determination of other cases, either in this or in inferior courts." *Hertz v. Woodman*, 218 U.S. 205, 213-14 (1910).

Moreover, giving binding effect to an opinion whose reasoning lacks majority support does violence to the distinction between *ratio decidendi* and *obiter dictum*. The *ratio decidendi* is the rationale that "is considered to have been necessary to the decision of the actual issue between the litigants." C.K. Allen, *Law in the Making* 148 (1927). Only the *ratio decidendi* represents the holding of the Court. *See United States ex rel. Bernardin v. Duell*, 172 U.S. 576, 586 (1899); *Smith v. City of Jackson*, 544 U.S. 228, 262 (2005) (O'Connor, J., concurring in the judgment); *cf. The Rock Island Bridge*, 73 U.S. 213, 216 (1867) ("mere dictum ... not being necessary for the decision of the case cannot be taken as authority"). The Eleventh Circuit ignored this essential distinction when it concluded that the "concurring opinion is the holding of *Freeman*," Pet. App. 9a, without assessing whether the *reasoning* of that opinion was shared by a majority of the Court.

It is no answer to say that the concurrence was necessary to provide a fifth vote for the judgment. After all, the concurring opinion was no more "necessary" than the plurality. "[W]hen the Supreme Court opinions yielding a result are on different wavelengths ..., characterizing one as narrower than the other is just a kind of judicial *force majeure*." *Duvall*, 740 F.3d at 620 (Williams, J.). Only the logical subset approach avoids this problem: When the rationale of

one opinion is completely subsumed by another, the narrower opinion represents the *ratio decidendi* because its reasoning enjoys majority support.

There is something seriously wrong with an approach that would give controlling effect to reasoning with which eight Justices disagreed—but that is exactly what the Eleventh Circuit did here. As the government explained previously in another case involving *Marks*, "[n]either precedent nor logic supports the court of appeals' conclusion that [a concurring Justice's standard] must be treated as the controlling rule of law even when it yields an outcome inconsistent with a controlling legal principle endorsed by eight Members of this Court." U.S. Petition for Writ of Certiorari, *United States v. McWane, Inc.*, No. 08-223, 2008 WL 3884295, at *23 (U.S. Aug. 21, 2008). That confounding result is precisely what the Eleventh Circuit's rule accomplished, as other courts have candidly acknowledged: "Even though eight Justices disagreed with Justice Sotomayor's approach and believed it would produce arbitrary and unworkable results, her reasoning provided the narrowest, most case-specific basis for deciding *Freeman*." *Dixon*, 687 F.3d at 359 (citations omitted).

That backwards result is not unique to this case. When lower courts fail to seek a common rationale, they often unthinkingly apply the label "narrowest" to a single-Justice opinion and then give it binding effect—even when no other Justice agreed with that opinion. *See, e.g., J & B Entm't, Inc. v. City of Jackson*, 152 F.3d 362, 370 (5th Cir. 1998) (following Justice Souter's concurrence in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991), because other lower courts had

"generally adopted [it] as the narrowest opinion"); *Blum v. Witco Chem. Corp.*, 888 F.2d 975, 981 (3d Cir. 1989) (applying Justice O'Connor's concurrence in *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711 (1987) on the view it was "determinative," despite "awkwardness in attributing precedential value to an opinion of one Supreme Court justice to which no other justice adhered"). The Court should reject any approach that produces "the anomaly of the views of one justice, with whom no one concurs, being the law of the land." *Dague v. City of Burlington*, 935 F.2d 1343, 1360 (2d Cir. 1991), *rev'd on other grounds*, 505 U.S. 557, 571 (1992).

The Eleventh Circuit's approach is a recipe for chaos. Under the logical subset approach, at least, the inquiry is confined; a lower court need only review the separate opinions supporting the judgment and identify shared reasoning. *Supra* 42-43. But the analysis proposed by the decision below would bring a high degree of difficulty to an inquiry that already has caused confusion and dissent.[8] According to the Eleventh Circuit, a court would have to find "the narrowest grounds ... that, *when applied to other cases*, would

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[8] *E.g.*, *Grutter v. Bollinger*, 539 U.S. 306, 325 (2003) (recognizing "divergent opinions of the lower courts" on whether Justice Powell's plurality in *Bakke* controlled under *Marks*); *Nichols v. United States*, 511 U.S. 738, 745 (1994) (describing the "degree of confusion" in the lower courts following the "splintered decision" in *Baldasar v. Illinois*, 446 U.S. 222 (1980)); *see* U.S. Petition for Writ of Certiorari, *McWane*, *supra*, at *16-19 (describing "the difficulty that courts have encountered in identifying the legal principles established by *Rapanos*" *v. United States*, 547 U.S. 715, 767 (2006)); Re, *supra*, at 13 (identifying circuit splits); Williams, *supra*, at 807 n.50 (same).

consistently produce results that a majority of the Justices supporting the result in the governing precedent would have reached." Pet. App. 7a (quoting Bryan A. Garner et al., *The Law of Judicial Precedent* 200 (2016)) (emphases added). In short, in order to decide which opinion to follow, a lower court would have to hypothesize future cases; imagine how each of the authoring Justices would resolve them; and then select the opinion that would "consistently produce results" that garner a majority.

That's a tall order. However challenging it ordinarily may be to apply established law to new settings, it will be many times more difficult for lower courts to "run the facts and circumstances of the current case through [each of] the tests articulated in the Justices' various opinions." *Duvall*, 740 F.3d at 611 (Kavanaugh, J.)—especially in circumstances complicated enough that the Court itself could not converge around any unifying rationale. And asking a lower court to plug hypothetical facts into multiple conflicting opinions in order to pick one that would "consistently" produce majorities is a project fit for oracles.

This very case proves the point. Judges have disagreed starkly about whether hypothetical defendants would be eligible for relief under the *Freeman* concurrence's approach but not the plurality's. *Compare, e.g.*, Pet. App. 12a-13a ("whenever Justice Sotomayor's opinion would permit a sentence reduction, the plurality opinion would as well"), *Duvall*, 740 F.3d at 612 (Kavanaugh, J.), *and Davis*, 825 F.3d at 1036-37 (Bea, J., dissenting), *with Epps*, 707 F.3d at 351 ("[T]he set of cases where the defendant prevails under the concurrence is not always nestled within the

set of cases where the defendant prevails under the plurality ...."), *and Davis*, 825 F.3d at 1022-23 (majority opinion).

Compounding that indeterminacy, even courts that share those predictions may disagree about how "consistently" a separate opinion must produce results with which a hypothetical majority of Justices would agree for it to be "narrowest." Take *Rapanos*. There, in interpreting the phrase "waters of the United States" in a jurisdictional statute, a four-Justice plurality proposed one test, Justice Kennedy concurred in the judgment, and four Justices dissented. Several lower courts have agreed that Justice Kennedy would find jurisdiction in most instances where the plurality would—but they disagree about what this means. One court believed that, because divergences between the plurality and the concurrence would be "rare," "as a practical matter the Kennedy concurrence is the least common denominator" and controls under *Marks*. *United States v. Gerke Excavating, Inc.*, 464 F.3d 723, 725 (7th Cir. 2006). But another court could not accept the "bizarre outcome" of treating the concurrence as controlling even though eight Justices might well disagree with it in particular applications. *Johnson*, 467 F.3d at 64.

The promise that it is "easy" to predict the results generated by each separate opinion, *Duvall*, 740 F.3d at 611 (Kavanaugh, J.), is at odds with this experience. *Marks* should not be "an invitation from [this] Court to read its fragmented opinions like tea leaves, attempting to divine what the Justices 'would have' held." *Hopwood v. Texas*, 236 F.3d 256, 275 n.66 (5th

Cir. 2000). "[N]ose-counting" of that sort "is an exercise for litigators, not jurists." *People v. Lopez*, 286 P.3d 469, 485 (Cal. 2012) (Liu, J., dissenting). Lower courts shouldn't spend their time guessing about majority opinions that don't exist, any more than they should predict when the Court might overturn its past precedents. *Cf. Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989). It is this Court's prerogative to announce binding rules, just like it is the Court's prerogative to *re*nounce them. The proper rule is the simpler one: Shared results without shared rationales generate only judgments.

C. The single-Justice concurrence in *Freeman* is not binding precedent.

Under no theory was the *Freeman* concurrence a "narrowest ground[]" with which a majority of the Court agreed.

1. *Freeman* plainly does not satisfy the logical subset test. The plurality and the concurrence disagreed about the meaning of the key statutory text and diverged on the basis for the judgment. *Supra* 5-6. The plurality interpreted "based on" to refer to "*the judge's decision* to accept the plea and impose the recommended sentence." 564 U.S. at 534 (emphasis added). The concurring opinion agreed as to the judgment, but "differ[ed] as to the reason why." *Id.* at 534. According to the concurrence, following a C-type agreement, "it is the binding plea agreement" upon which the sentence is based. *Id.* at 535; *contra id.* at 533 (plurality) (responding that "[t]he statute ... calls for an inquiry into the reasons for a judge's sentence,

not the reasons that motivated or informed the parties").[9]

In short, there was "no explicit majority agreement on all the analytically necessary portions of [the] Supreme Court['s] opinion." *King*, 950 F.2d at 784. Rather, their underlying rationales simply differed. Accordingly, the concurrence is not "narrower" than the plurality.[10]

2. The Eleventh Circuit's results test also is not satisfied here. The court of appeals was wrong that whenever relief is available under the *Freeman* concurrence's approach, it also is available under the plurality's. Pet. App. 8a. There are scenarios under which a defendant would be entitled to a sentence reduction under the plurality's rule but not the concurrence's, and scenarios in which the converse is true. *See Davis*, 825 F.3d at 1023; *Epps*, 707 F.3d at 350 & n.8. No one

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[9] The concurrence also "necessarily reject[ed] the categorical rule ... endorsed by the dissent." *Freeman*, 564 U.S. at 539. The dissent's approach "would have courts ignore the [plea] agreement's express terms, which the court 'applie[s]' when imposing the term of imprisonment." *Id.* at 540 n.4 (second alteration in original).

[10] *See Glossip v. Gross*, 135 S. Ct. 2726, 2793 (2015) (Sotomayor, J., dissenting) (when a concurring opinion "is unrelated to, and thus not any broader or narrower than," the plurality's approach, the plurality should not control under *Marks*); U.S. Brief in Opposition, *Olive v. United States*, No. 15-1166, 2016 WL 2937081, at *12 (U.S. May 18, 2016) (discussing splintered opinions in *United States v. Santos*, 553 U.S. 507 (2008), and asserting that "neither opinion is a logical subset of the other or provides a common denominator because the opinions rest on logically inconsistent premises").

disagrees that "'sometimes' is a middle ground between 'always' and 'never,'" Pet. App. 13a (quoting *Duvall*, 740 F.3d at 612 (Kavanaugh, J.)), but the Eleventh Circuit was wrong that the *Freeman* plurality is an "'always'" rule. And while this incomplete overlap in the Venn diagrams is not *necessary* to show that *Marks* does not apply here, *see supra* 42-44 (discussing the need for common rationales); *Duvall*, 740 F.3d at 618-20 (Williams, J.), it certainly is sufficient.

On the one hand, there plainly are situations in which the plurality would find a defendant eligible under § 3582 but the concurrence would not—for instance, when a judge made clear she was relying on the Guidelines to accept the plea, but the agreement did not expressly invoke the Guidelines. *Supra* 5-6. In addition, there are multiple scenarios in which the defendant could prevail under the concurrence's rationale but not the plurality's.

First, even when the parties present a plea agreement that incorporates the Guidelines and settles on a Guidelines range, a "sentencing court ... might consider and reject the guideline range used by the parties ... because, having considered the applicable guidelines range, the court rejects it as a matter of policy and selects its sentence without regard to it." *Davis*, 825 F.3d at 1023 (quoting *Epps*, 707 F.3d at 350 n.8) (some alterations in original). District courts have "authority to vary from the ... Guidelines based on *policy* disagreement with them." *Spears v. United States*, 555 U.S. 261, 264 (2009) (per curiam). And they have done so, for instance, upon concluding that some Guidelines yield excessive sentences for certain types of offenses. *E.g.*, *id.* at 262-63; *United States v.*

Lewis, 623 F. Supp. 2d 42, 45 (D.D.C. 2009); *United States v. R.V.*, 157 F. Supp. 3d 207, 258-60 (E.D.N.Y. 2016).

But the court might nonetheless "decide[] for reasons unrelated to the guidelines range to impose the sentence the parties agreed upon," for instance because of similarity to sentences for like offenders in recent cases, or based on other relevant § 3553(a) factors. *Epps*, 707 F.3d at 350 n.8. If the applicable Guidelines range later were lowered, a lower-court judge reasonably would predict that the concurrence would permit a retroactive reduction (because the plea agreement was based on the Guidelines) while the plurality would not (because the Guidelines were not the basis for the district court's sentencing decision). This is exactly what happened in *Garrett*, 758 F.3d at 755, as discussed above (at 28).

There are still further situations in which the same sort of disconnect between the plurality and concurrence likely would arise. *See Davis*, 825 F.3d at 1023; *Epps*, 707 F.3d at 350 n.8. Take, for instance, a C-type agreement that invokes the Guidelines and recommends a sentence at the bottom of a specified range. The concurrence likely would find the sentence to be based on the Guidelines for that reason alone. But what if the district court concludes that the parties settled on the *wrong* Guidelines range—perhaps because they erred in assessing career offender status? *See* U.S.S.G. § 4B1.1. The district court might nonetheless accept the plea because it finds the recommended range acceptable for reasons unrelated to the Guidelines—for instance, a defendant's upbringing or his post-crime repentance. Given the district

court's reasons for imposing the sentence, the plurality—unlike the concurrence—likely would conclude that the sentence was *not* based on the Guidelines. *See Davis*, 825 F.3d at 1023; *Epps*, 707 F.3d at 350 n.8.

Accordingly, the Eleventh Circuit was wrong that, whenever the *Freeman* concurrence "would grant relief to a defendant sentenced according to a binding plea agreement, the plurality opinion would agree with the result because, under the logic of the plurality opinion, a defendant should always receive relief." Pet. App. 8a; *see also Duvall*, 740 F.3d at 608 (Kavanaugh, J.). Each approach would afford relief in scenarios where the other would not. *See Duvall*, 740 F.3d at 619 (Williams, J.). The Russian dolls simply don't fit; one may be generally smaller, but they bulge and taper in different places. So even if it were permissible to focus exclusively on potential *results*—and ignore disagreement in the opinions' *rationales*, *but cf. supra* 44-51—*Freeman* still provides no binding holding under *Marks*.

D. Alternatively, the Court may wish to revisit *Marks*'s treatment of divided opinions and hold that only opinions joined by a majority of Justices merit precedential status.

As the foregoing discussion should make clear, *Marks* is subject to great uncertainty. The Court has expressed concerns about its viability. *E.g.*, *Nichols*, 511 U.S. at 745-46 (*Marks* can be "more easily stated than applied"; "it [is] not useful to pursue the *Marks* inquiry to the utmost logical possibility when it has so

obviously baffled and divided the lower courts"). It has been a repeated source of disagreement. *See, e.g.*, *Santos*, 553 U.S. at 523-24 (plurality opinion); *id.* at 528 & n.7 (Stevens, J., concurring in the judgment). And "[i]n recent years, fragmented Supreme Court decisions have continued to bedevil both state and federal courts." Re, *supra*, at 3.

Accordingly, the Court may conclude that the *Marks* enterprise has failed, and return to a rule that only an opinion joined by a majority of Justices establishes binding precedent. This approach would produce greater certainty for lower courts and litigants; focus them on substantive legal questions rather than meta-jurisprudential Russian dolls; and encourage courts to coalesce around majority opinions with circumscribed rationales. If the Court so concludes, then the decision below must be vacated for erroneously treating the *Freeman* concurrence as controlling precedent.

"Far from having an ancient pedigree, the *Marks* rule is an invention of the last forty years." Re, *supra*, at 5. Any rule in this context should serve a pragmatic purpose—to provide guidance to lower courts. Measured against that standard, however, *Marks* has created more cost than benefit. While *Marks* was "designed to clarify the precedential significance of [plurality] decisions," it "has instead exacerbated the confusion." Williams, *supra*, at 864. That confusion is rampant. The lower courts have been "baffled and divided" when attempting to apply *Marks*. *Nichols*, 511 U.S. at 746; *see supra* n.8 (identifying circuit splits generated by *Marks*). If the purpose of *Marks* is to promote uniformity by identifying a controlling opinion

where there otherwise might be none, this disarray indicates that the game may not be worth the candle.

These difficulties applying *Marks* suggest the sort of "inherent confusion created by an unworkable decision" that justifies a departure from stare decisis. *Patterson v. McLean Credit Union*, 491 U.S. 164, 173 (1989). "Revisiting precedent is particularly appropriate where, as here ... the precedent consists of a judge-made rule that was recently adopted to improve the operation of the courts, and experience has pointed [out] the precedent's shortcomings." *Pearson v. Callahan*, 555 U.S. 223, 233 (2009). And unlike when "'property and contract rights'" are at stake, reevaluating this "'procedural ... rule[]'" would not "upset settled expectations on anyone's part." *Id.* (quoting *Payne v. Tennessee*, 501 U.S. 808, 828 (1991)).

Nor is a rule like *Marks* a necessity, as certain state courts have concluded.[11] To be sure, there may be marginal cases in which some version of *Marks* might resolve an issue where confusion otherwise would persist. But *Marks* generates immense confusion of its own, very likely more than it resolves. And it is a distraction; it forces lower courts to spend their time counting noses and "reading the tea leaves." *Triplett Grille, Inc. v. City of Akron*, 40 F.3d 129, 134 (6th

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[11] *Rowland v. Washtenaw Cty. Rd. Comm'n*, 731 N.W.2d 41, 47 n.7 (Mich. 2007) ("decisions in which no majority of the justices participating agree with regard to the reasoning are not an authoritative interpretation under the doctrine of stare decisis"); *cf. State v. Kikuta*, 253 P.3d 639, 658 n.14 (Haw. 2011), *as corrected* (Aug. 11, 2011).

Cir. 1994). When the Court cannot reach a majority decision on a "frontier legal problem[]," the lower courts should focus their attention on the substantive merits of the question, so that the "diverse opinions from[] state and federal appellate courts may yield a better informed and more enduring final pronouncement by this Court." *Arizona v. Evans*, 514 U.S. 1, 23 n.1 (1995) (Ginsburg, J., dissenting). With the benefit of this percolation, the Court may eventually reach a majority, either because of changed composition or because a Justice, with time and upon reflection, casts a different vote. *Cf. Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519 (2013) (arriving at a 6-3 decision after splitting 4-4 on the same issue in *Costco Wholesale Corp. v. Omega, S.A.*, 562 U.S. 40 (2010) three years earlier).

In addition, a return to the historical norm—that only majority opinions have precedential force—is likely to generate greater certainty by encouraging divergent views on the Court to merge together into opinions that are both narrower and binding. "[W]hen it comes to identifying majority agreement on the Court, the most efficient actor ... is the Court itself, at the time of its decision." Re, *supra*, at 20. And abrogating *Marks* could produce incentives to tamp down the "unsettling ... proliferation of separate opinions with no single opinion commanding a clear majority." Ruth Bader Ginsburg, *Remarks on Writing Separately*, 65 Wash. L. Rev. 133, 148 (1990); *see also* Re, *supra*, at 21-23. The events of the past two years demonstrate that incentives toward narrowness and

consensus may have a powerful effect.[12] As the Chief Justice has remarked, although "[d]ivision should not be artificially suppressed, ... the rule of law benefits from a broader agreement." Hope Yen, *Roberts Seeks Greater Consensus On Court*, Wash. Post, May 21, 2006. "The broader the agreement among the justices, the more likely it is a decision on the narrowest possible grounds." *Id.*

Accordingly, if the Court concludes that *Marks* is unworkable or unsound, it should return to the pre-*Marks* framework under which only a majority opinion establishes binding precedent. And whether the Court concludes that *Marks* should be abandoned entirely, or merely that *Marks* does not convert the *Freeman* concurrence into a holding, the judgment below cannot stand. The court of appeals erroneously relied on the concurrence because it felt bound to do so, and at a minimum, its decision must be vacated for the court to consider the issue anew.

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[12] *See Justice Sotomayor Laments Perception of Judges as Political*, L.A. Times, Mar. 9, 2017 ("We are talking more .... We are trying to reach consensus more."); Patrick Marley, *Justice Elena Kagan Says Court Had To Reach More Consensus After Antonin Scalia's Death*, Milwaukee J. Sentinel, Sept. 8, 2017 ("[W]e all made a very serious effort to try to find common ground even where we thought we couldn't.").

CONCLUSION

For the foregoing reasons, the judgment below should be reversed or vacated.

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No. 17-155

In the Supreme Court of the United States

ERIK LINDSEY HUGHES, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether the lower courts correctly applied the rule in *Marks* v. *United States*, 430 U.S. 188 (1977), for interpreting divided decisions of this Court, when they denied petitioner a sentence reduction on the ground that he would be ineligible for such a reduction under the approaches of five Justices in *Freeman* v. *United States*, 564 U.S. 522 (2011).

2. If the issue addressed in *Freeman* is revisited, whether a defendant who was sentenced under a plea agreement containing a specific sentence that was binding on the district court under Federal Rule of Criminal Procedure 11(c)(1)(C) may seek a sentence reduction under 18 U.S.C. 3582(c)(2), which authorizes the reduction of a sentence that was "based on a sentencing range that has subsequently been lowered by the Sentencing Commission."

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statutes, rule, and guidelines provisions involved 1
Statement 2
Summary of argument 12
Argument 16
I. The court of appeals correctly determined that petitioner is ineligible for a sentence reduction by applying this Court's precedent 17
A. *Marks* gives divided decisions of this Court binding effect in future cases 18
B. The court of appeals correctly applied the principles of *Marks* 21
1. Petitioner's "common reasoning" approach is mistaken 21
a. Petitioner's "common reasoning" requirement cannot be squared with *Marks* and other decisions of this Court 22
b. Petitioner's "common reasoning" approach is unsound 28
2. This Court should not replace *Marks* with a rule under which only majority opinions have precedential effect 31
3. *Freeman* does not lack precedential effect on the theory that no single opinion in that case qualifies as the narrowest 33
II. Defendants who plead guilty in exchange for specific sentences pursuant to Rule 11(c)(1)(C) are not eligible for sentence reductions under 18 U.S.C. 3582(c)(2) 37
A. Section 3582(c)(2) represents a narrow exception to the rule that a sentence of imprisonment may not be modified 38

Table of Contents—Continued Page

B. Defendants who plead guilty in exchange for specific sentences under Rule 11(c)(1)(C) plea agreements are sentenced "based on" their plea agreements, not based on any Guidelines range 39
1. A defendant's sentence is "based on" a calculation of the Guidelines range only when that calculation is the foundation of the defendant's sentence 39
2. The foundation of the sentence of a defendant who pleads guilty under Rule 11(c)(1)(C) is the plea agreement, not a Guidelines range 42
C. The Sentencing Commission's limitations confirm that defendants sentenced under Rule 11(c)(1)(C) plea agreements are ineligible for Section 3582(c)(2) reductions 49
D. Using Section 3582(c)(2) to reduce a sentence that was required under Rule 11(c)(1)(C) inappropriately vitiates the terms of the parties' agreement 50
1. Plea agreements are essential to the administration of criminal justice 51
2. The government's construction of Section 3582(c)(2) preserves the parties' bargain 52
Conclusion 56
Appendix — Statutes, rule, and guidelines provisions involved 1a

TABLE OF AUTHORITIES

Cases: Page

A Book Named 'John Cleland's Memoirs of a Woman of Pleasure' v. Attorney Gen., 383 U.S. 413 (1966) 22, 23
Baldasar v. Illinois, 446 U.S. 222 (1980) 32
Bank of Am. Corp. v. City of Miami, 137 S. Ct. 1296 (2017) 47
Bobby v. Dixon, 565 U.S. 23 (2011) 19, 35
Bordenkircher v. Hayes, 434 U.S. 357 (1978) 51
Bowen v. Massachusetts, 487 U.S. 879 (1988) 45
Brady v. United States, 397 U.S. 742 (1970) 51, 52, 55
Braxton v. United States, 500 U.S. 344 (1991) 4
Carrigan v. United States, 564 U.S. 1051 (2011) 29
City of Ontario v. Quon, 560 U.S. 746 (2010) 19, 36
Dillon v. United States, 560 U.S. 817 (2010) 4, 38, 39, 49
Freeman v. United States, 564 U.S. 522 (2011) ..... *passim*
Furman v. Georgia, 408 U.S. 238 (1972) 24, 25
Gardner v. Florida, 430 U.S. 349 (1977) 27
Ginzburg v. United States, 383 U.S. 463 (1966) 23
Goins v. United States, 564 U.S. 1051 (2011) 29
Graham v. Florida, 560 U.S. 48 (2010) 18, 26
Gregg v. Georgia, 428 U.S. 153 (1976) 18, 24, 25
Harmelin v. Michigan, 501 U.S. 957 (1991) 26
Hemi Grp., LLC v. City of New York, 559 U.S. 1 (2010) 47
Hertz v. Woodman, 218 U.S. 205 (1910) 28
Kimble v. Marvel Entm't, LLC, 135 S. Ct. 2401 (2015) 20, 28, 29, 31
Leocal v. Ashcroft, 543 U.S. 1 (2004) .....

Cases—Continued: Page

Lexmark Int'l, Inc. v. *Static Control Components, Inc.*, 134 S. Ct. 1377 (2014) 47
Manzanares v. *City of Albuquerque*, 628 F.3d 1237 (10th Cir. 2010) 42
Marks v. *United States*, 430 U.S. 188 (1977) ..... *passim*
Martin v. *Hunter's Lessee*, 14 (1 Wheat.) 304 (1816) 20
Mishkin v. *New York*, 383 U.S. 502 (1966) 23
Mississippi Band of Choctaw Indians v. *Holyfield*, 490 U.S. 30 (1989) 20, 28
Missouri v. *Frye*, 566 U.S. 134 (2012) 51
Moses H. Cone Mem'l Hosp. v. *Mercury Constr. Corp.*, 460 U.S. 1 (1983) 19, 36
Nichols v. *United States*, 511 U.S. 738 (1994) 32, 33
OBB Personenverkehr AG v. *Sachs*, 136 S. Ct. 390 (2015) 15, 41
O'Dell v. *Netherland*, 521 U.S. 151 (1997) 27
Panetti v. *Quarterman*, 551 U.S. 930 (2007) 39
Pasquantino v. *United States*, 544 U.S. 349 (2005) 39
Pepper v. *United States*, 562 U.S. 476 (2011) 53
Rivera-Martinez v. *United States*, 564 U.S. 1051 (2011) 29
Santobello v. *New York*, 404 U.S. 257 (1971) 51
Saudi Arabia v. *Nelson*, 507 U.S. 349 (1993) 15, 40, 41
Seminole Tribe v. *Florida*, 517 U.S. 44 (1996) 27
Teague v. *Lane*, 489 U.S. 288 (1989) 38
United States v. *Addonizio*, 442 U.S. 178 (1979) 38
United States v. *Bownes*, 405 F.3d 634 (7th Cir.), cert. denied, 546 U.S. 926 (2005) 52
United States v. *Davis*, 825 F.3d 1014 (9th Cir. 2016) 20, 28, 34
United States v. *Duvall*, 740 F.3d 604 (D.C. Cir. 2013) ..... *passim*

Cases—Continued: Page

United States v. *Frady*, 456 U.S. 152 (1982) 38
United States v. *French*, 719 F.2d 387 (11th Cir. 1983), cert. denied, 466 U.S. 960 (1984) 44
United States v. *Hyde*, 520 U.S. 670 (1997) 2, 51
United States v. *Jacobsen*, 466 U.S. 109 (1984) 19
United States v. *Porter*, 405 F.3d 1136 (10th Cir), cert. denied, 546 U.S. 980 (2005) 55
United States v. *Robinson*, 587 F.3d 1122 (D.C. Cir. 2009) 52
United States v. *Sahlin*, 399 F.3d 27 (1st Cir. 2005) 52
United States v. *Silva*, 413 F.3d 1283 (10th Cir. 2005) 52
United States v. *Smith*, 918 F.2d 664 (6th Cir. 1990), cert. denied, 498 U.S. 1125 (1991) 46
United States v. *Stevens*, 548 F.2d 1360 (9th Cir.), cert. denied, 430 U.S. 975 (1977) 44
United States v. *Thompson*, 680 F.2d 1145 (7th Cir.), cert. denied, 459 U.S. 1089 (1982), and 459 U.S. 1108 (1983) 44

Constitution, statutes, guidelines, and rules:

U.S. Const.:
Amend. I 22, 23, 24
Amend. VIII 25, 26, 27
Foreign Sovereign Immunities Act of 1976, 28 U.S.C. 1602 *et seq.* 40
28 U.S.C. 1605(a)(2) 40
Sentencing Reform Act of 1984, Pub. L. No. 98-473, Tit. II, ch. II, 98 Stat. 1987 (18 U.S.C. 3551 *et seq.* and 28 U.S.C. 991 *et seq.*) 3
18 U.S.C. 3553(a) 4, 8, 39
18 U.S.C. 3582 ..... 45, 1a
18 U.S.C. 3582(c) 4, 38, 2a

Statutes, guidelines, and rules—Continued: Page

18 U.S.C. 3582(c)(2) ..... *passim*, 3a
28 U.S.C. 994(a)(1) 3
28 U.S.C. 994(a)(2) 3
28 U.S.C. 994(a)(2)(C) 4
28 U.S.C. 994(*o*) 4
28 U.S.C. 994(u) 4
18 U.S.C. 922(g)(1) 2
18 U.S.C. 3742(a)(2) 46, 4a
21 U.S.C. 841(b)(1)(A) 6, 54
21 U.S.C. 841(b)(1)(A)(viii) 2, 6
21 U.S.C. 846 ..... 2, 6
21 U.S.C. 851(a) 7
U.S. Sentencing Guidelines:
§ 1B1.10 ..... 4, 16, 49, 50, 13a
§ 1B1.10(a)(1) 4, 13a
§ 1B1.10(a)(2)(B) 5, 13a
§ 1B1.10(b)(1) 16, 49, 50, 14a
§ 1B1.10(d) 4, 16a
§ 6B1.2 (2011) 50
§ 6B1.2 ..... 50, 27a
App. C Supp.:
Amend. 782 (Nov. 1, 2014) 9, 10, 54, 55
Amend. 788 (Nov. 1, 2014) 10
Fed. R. Civ. P.:
Rule 60(b)(5) 42
Fed. R. Crim. P.:
Rule 11(c)(1) 23, 10a
Rule 11(c)(1)(B) 43, 52, 10a
Rule 11(c)(1)(C) ..... *passim*, 10a
Rule 11(c)(3)(A) 3, 43, 11a
Rule 11(c)(4) 3, 43, 11a

Rules—Continued: Page

Rule 11(c)(5)(B) 3, 43, 12a
Rule 11(d)(2)(B) 51, 12a
Rule 11 advisory committee's note (1974 Amendment) 43, 51
Rule 11 advisory committee's note (1979 Amendment) 43
Sup. Ct. R. 10 28

Miscellaneous:

Joseph M. Cacace, Note, *Plurality Decisions in the Supreme Court of the United States: A Reexamination of the* Marks *Doctrine After* Rapanos *v.* United States, 41 Suffolk U. L. Rev. 97 (2007) 32
Comment, *Supreme Court No-Clear-Majority Decisions: A Study in* Stare Decisis, 24 U. Chi. L. Rev. 99 (1956) 32
W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* (5th ed. 1984) 46
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Linda Novak, Note, *The Precedential Value of Supreme Court Plurality Decisions*, 80 Colum. L. Rev. 756 (1980) 32
Richard M. Re, *Beyond the Marks Rule* (Jan. 5, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3090620 32
Restatement (Second) of the Law of Contracts (1981) 48
Restatement (Second) of the Law of Torts (1965) 46
S. Rep. No. 225, 98th Cong., 1st Sess. (1983) 38, 46
The American Heritage Dictionary (4th ed. 2006) 40
1 *The Oxford English Dictionary* (2d ed. 1989) 40

Miscellaneous—Continued: Page

Mark Alan Thurmon, *When the Court Divides: Reconsidering the Precedential Value of Supreme Court Plurality Decisions*, 42 Duke L.J. 419 (1992) 24

Webster's New International Dictionary (2d ed. 1957) 40

Webster's Third New International Dictionary (1981) 40

11 Charles Alan Wright et al., *Federal Practice and Procedure* (3d ed. 2012) 42

In the Supreme Court of the United States

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 849 F.3d 1008. The order of the district court (Pet. App. 16a-30a) is not published in the Federal Supplement but is available at 2015 WL 13344902.

JURISDICTION

The judgment of the court of appeals was entered on February 27, 2017. On May 22, 2017, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including July 27, 2017, and the petition was filed on that date. The petition was granted on December 8, 2017. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTES, RULE, AND GUIDELINES PROVISIONS INVOLVED

The relevant statutes, provisions of the Federal Rules of Criminal Procedure, and provisions of the U.S.

Sentencing Guidelines are reprinted in an appendix to this brief. App., *infra*, 1a-27a.

STATEMENT

Following a guilty plea in the United States District Court for the Northern District of Georgia, petitioner was convicted of conspiracy to possess with intent to distribute at least 500 grams of methamphetamine, in violation of 21 U.S.C. 841(b)(1)(A)(viii) and 846, and possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1). Pet. App. 3a, 16a-17a. Pursuant to Federal Rule of Criminal Procedure 11(c)(1)(C), petitioner and the government entered into a plea agreement that stipulated a 180-month sentence. The district court accepted the agreement and imposed the specified term of imprisonment, to be followed by five years of supervised release. Pet. App. 17a. The U.S. Sentencing Commission later retroactively amended the Sentencing Guidelines for most drug offenses. Petitioner moved for a sentence reduction under 18 U.S.C. 3582(c)(2). The district court denied that motion, Pet. App. 16a-30a, and the court of appeals affirmed, *id.* at 1a-15a.

1. a. Rule 11 provides that "[a]n attorney for the government and the defendant's attorney, or the defendant when proceeding pro se, may discuss and reach a plea agreement." Fed. R. Crim. P. 11(c)(1). The rule then "divides plea agreements into three types, based on what the [g]overnment agrees to do." *United States* v. *Hyde*, 520 U.S. 670, 675 (1997). In the type at issue here—sometimes called a "type C" agreement, see *ibid.*, because it is described in subparagraph (C) of Rule 11(c)(1)—the government and the defendant agree on aspects of the sentence that bind the sentencing court if the plea is accepted. More specifically, the rule provides:

> the plea agreement may specify that an attorney for the government will:
>
> * * *
>
> (C) agree that a specific sentence or sentencing range is the appropriate disposition of the case, or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply (such a recommendation or request binds the court once the court accepts the plea agreement).

Fed. R. Crim. P. 11(c)(1). The rule further permits the district court to "accept [a type C] agreement, reject it, or defer a decision until the court has reviewed the presentence report." Fed. R. Crim. P. 11(c)(3)(A).

Consistent with the "bind[ing]" nature of a type C agreement once it is "accept[ed]" by the district court (Fed. R. Crim. P. 11(c)(1)(C)), the court is required, upon accepting the agreement, to "inform the defendant that * * * the agreed disposition will be included in the judgment." Fed. R. Crim. P. 11(c)(4). Similarly, if the court rejects such an agreement, the court must, *inter alia*, "advise the defendant" that it is "not required to follow the plea agreement and give the defendant an opportunity to withdraw the plea." Fed. R. Crim. P. 11(c)(5)(B).

b. In the Sentencing Reform Act of 1984 (SRA), Pub. L. No. 98-473, Tit. II, ch. II, 98 Stat. 1987, Congress created the Sentencing Commission and charged it with promulgating sentencing guidelines and policy statements "regarding application of the guidelines or any other aspect of sentencing or sentence implementation," 28 U.S.C. 994(a)(1) and (2). Congress also charged the Commission with periodically reviewing and revising its

guidelines. 28 U.S.C. 994(*o*). When the Commission reduces the recommended term of imprisonment for a particular offense, it may specify "in what circumstances and by what amount the sentences of prisoners serving terms of imprisonment for the offense may be reduced." 28 U.S.C. 994(u). As a result, the Commission has "the unusual explicit power to decide whether and to what extent its amendments reducing sentences will be given retroactive effect." *Braxton* v. *United States*, 500 U.S. 344, 348 (1991) (emphasis omitted).

A court generally "may not modify a term of imprisonment once it has been imposed." 18 U.S.C. 3582(c); see *Dillon* v. *United States*, 560 U.S. 817, 819 (2010). But an exception permits a modification "in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. 994(*o*)." 18 U.S.C. 3582(c)(2). In such a case, Section 3582(c)(2) gives a court discretion to "reduce the term of imprisonment," after considering the statutory sentencing factors set out in 18 U.S.C. 3553(a), but only "if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission." 18 U.S.C. 3582(c)(2); see 28 U.S.C. 994(a)(2)(C).

The Commission has addressed such sentence reductions in a policy statement contained in Sentencing Guidelines § 1B1.10. Section 1B1.10 limits the availability of sentence reductions to cases involving the Guidelines amendments listed in subsection (d) of that policy statement. *Id.* § 1B1.10(a)(1). It additionally provides that no reduction is permitted if, *inter alia*, "[the] amendment listed in subsection (d) does not have the

effect of lowering the defendant's applicable guideline range." *Id.* § 1B1.10(a)(2)(B).

c. In *Freeman* v. *United States*, 564 U.S. 522 (2011), this Court addressed "whether defendants who enter into [Rule 11(c)(1)(C)] plea agreements that recommend a particular sentence as a condition of the guilty plea may be eligible for relief under § 3582(c)(2)" in light of Section 3582(c)(2)'s limitation of eligibility to defendants whose sentences were "based on" the Sentencing Guidelines. *Id.* at 525 (opinion of Kennedy, J.).

A plurality of four Justices concluded that a "district judge's decision to impose a sentence" may be deemed to be "based on the Guidelines even if the defendant agrees to plead guilty under Rule 11(c)(1)(C)." *Freeman*, 564 U.S. at 526 (opinion of Kennedy, J.). The plurality reasoned that the district judge must consider the Guidelines and calculate the defendant's Guidelines range when deciding whether to accept the plea agreement. *Id.* at 529-534. It concluded that Section "3582(c)(2) modification proceedings should be available to permit the district court to revisit a prior sentence to whatever extent the sentencing range in question was a relevant part of the analytic framework the judge used to determine the sentence or to approve the agreement." *Id.* at 530.

Justice Sotomayor concurred in the judgment, adopting what the plurality described as "an intermediate position" between the plurality and the dissent. *Freeman*, 564 U.S. at 532 (opinion of Kennedy, J.). Justice Sotomayor concluded that a sentence imposed under a Rule 11(c)(1)(C) agreement is "based on" the agreement itself, not on the district court's determinations of the Sentencing Guidelines. *Id.* at 535-536 (Sotomayor, J., concurring in the judgment). She observed that a Rule 11(c)(1)(C) agreement is binding once accepted

and that "[a]t the moment of sentencing, the court simply implements the terms of the agreement it has already accepted." *Ibid.* Justice Sotomayor took the view, however, that a defendant who entered into a Rule 11(c)(1)(C) agreement could be eligible for a sentence reduction if the plea agreement expressly tied the defendant's sentence to the Sentencing Guidelines. *Id.* at 534; accord *id.* at 536-540.

Four Justices dissented. *Freeman*, 564 U.S. at 544-551 (Roberts, C.J., dissenting). The dissenting Justices concluded that a defendant who pleads guilty pursuant to a Rule 11(c)(1)(C) agreement is never eligible for a sentence reduction under Section 3582(c)(2). The dissent reasoned, like Justice Sotomayor, that the sentence of such a defendant is "based on" the binding plea agreement rather than on the Sentencing Guidelines calculations of the district court. *Id.* at 544-546. The dissenters concluded that a Rule 11(c)(1)(C) defendant would be ineligible for a sentence reduction regardless of whether his plea agreement indicated that the Sentencing Guidelines were the basis for the parties' agreement on the specified term. The dissenters emphasized that even in such a case, the district court simply applied the fixed term or range in the plea agreement when imposing the sentence. *Id.* at 547-548.

2. Petitioner was a member of a methamphetamine trafficking ring in Georgia. He was indicted by a federal grand jury on drug and gun charges. Presentence Investigation Report (PSR) ¶¶ 12-22. The first count of the indictment charged petitioner with conspiring to possess with intent to distribute at least 500 grams of methamphetamine, in violation of 21 U.S.C. 841(b)(1)(A)(viii) and 846. Indictment 1. Because petitioner had three prior drug felonies at the time of the offense, he faced a

mandatory sentence of life imprisonment on the drug-conspiracy count if the government filed an information advising the court of petitioner's prior drug convictions. See 21 U.S.C. 841(b)(1)(A) (providing statutory minimum sentence of life imprisonment for a conviction "after two or more prior convictions for a felony drug offense"); 21 U.S.C. 851(a) (explaining that recidivist penalties are triggered by government's filing of a prior felony information); see also PSR ¶¶ 39, 43-44, 50. The remaining counts charged petitioner with possession of at least 50 grams of methamphetamine with intent to distribute, possession of a firearm following felony convictions, and possession of a firearm with an obliterated serial number. Indictment 1-3.

Petitioner pleaded guilty under a Rule 11(c)(1)(C) plea agreement in which the parties stipulated to the imposition of a sentence of 180 months of imprisonment. See Pet. App. 50a-66a (plea agreement). The agreement allowed petitioner to plead guilty to only two charges—the drug-conspiracy and gun-possession counts—with the government agreeing to dismiss the remaining counts. *Id.* at 54a-55a. In addition, the government agreed not to file the prior felony information that would have raised the statutory minimum sentence on the drug-conspiracy count from ten years of imprisonment to life imprisonment. *Ibid.*; see *id.* at 56a.

The plea agreement did not incorporate, cross-reference, or attempt to calculate petitioner's Guidelines range, either in agreeing to the 180-month sentence or otherwise. See Pet. App. 50a-66a. The agreement specified that petitioner "understands that, before imposing sentence in this case, the Court will be required to consider, among other factors, the provisions of the United States Sentencing Guidelines and that,

under certain circumstances, the Court has discretion to depart from those Guidelines." *Id.* at 54a. It then specified, however, that petitioner's plea was "entered under the specific provisions of Rule 11(c)(1)(C)" and that the agreed-upon sentence of 180 months "would bind the Court to impose this particular custodial sentence if the Court accepts this plea agreement." *Ibid.*

The district court accepted petitioner's guilty plea and took the plea agreement under advisement until sentencing. D. Ct. Doc. 53 (Dec. 19, 2013). At the start of the subsequent sentencing hearing, the court accepted the Rule 11(c)(1)(C) agreement. Pet. App. 32a-33a. The court stated that it had determined that the agreement "will result in a reasonable sentence that's in the best interest of the Government, the best interest of society, and the best interest of" petitioner, after consulting the PSR, the plea agreement, the advisory Sentencing Guidelines, and the guidance concerning individualized sentencing set forth at 18 U.S.C. 3553(a). Pet. App. 32a-33a.

After the district court accepted the plea agreement and bound itself to impose the specified sentence, the court calculated petitioner's precise range of imprisonment under the advisory Sentencing Guidelines. Pet. App. 33a-36a. It agreed with the Probation Office that petitioner's offense level was 31, which reflected the quantity of methamphetamine for which petitioner was responsible, with a downward adjustment for acceptance of responsibility. *Ibid.*; see PSR ¶¶ 31, 37-38. In addition, the court determined that petitioner fell into Criminal History Category VI—the highest category. Pet. App. 35a-36a. Taking petitioner's offense level and criminal history category together, the court

determined that the advisory Sentencing Guidelines range was 188 to 235 months of imprisonment. *Id.* at 36a.

Before imposing the sentence, the district court heard statements from petitioner, several of his family members, and attorneys for petitioner and the government. Pet. App. 37a-43a. Petitioner, his counsel, and the government each asked the court to impose sentence in accordance with the binding plea. *Id.* at 41a-43a. In doing so, petitioner and the government each noted that petitioner could have been exposed to a mandatory life sentence in the absence of the plea deal. *Id.* at 42a-43a (government counsel stating that the government had recommended the plea deal and the 180-month sentence "in light of the fact that [petitioner] was facing life without parole with his prior convictions" and in light of the underlying offense conduct); *id.* at 43a (petitioner's statement).

The district court imposed the agreed-upon 180-month sentence. Pet. App. 44a. It stated "that in the opinion of the Court the Government ha[d] acted very reasonably in connection with their recommendation in this case and defense counsel ha[d] acted very reasonably with his recommendation in this case as to what each lawyer believes to be a fair and reasonable sentence" and that the court was "convinced it ha[d] imposed a reasonable sentence." *Id.* at 47a.

3. Amendment 782 to the Sentencing Guidelines, which was proposed before petitioner was sentenced and adopted later that year, reduced by two levels the base offense level associated with most drug offenses, which is determined by the type and quantity of drugs involved. Sentencing Guidelines App. C Supp., Amend. 782 (Nov. 1, 2014). The Commission made the amend-

ment retroactively applicable to sentences that had already been imposed. *Id.* Amend. 788. Under the Guidelines as amended, petitioner's offense level would have fallen two levels to 29, and his advisory Guidelines range would have been 151 to 188 months of imprisonment. Pet. App. 4a.

4. Petitioner filed a pro se motion under 18 U.S.C. 3582(c)(2), asking the district court to reduce his agreed-upon 180-month sentence in light of Amendment 782. Pet. App. 71a-76a.

The district court denied the motion. Pet. App. 16a-30a. The court concluded that Justice Sotomayor's concurrence in the judgment was the controlling opinion in *Freeman*. *Id.* at 25a. And it concluded that petitioner was ineligible for a sentence reduction under Justice Sotomayor's approach because it was "abundantly clear that [petitioner's] sentence was not linked or tied to the Sentencing Guidelines." *Id.* at 28a.

5. The court of appeals affirmed. Pet. App. 1a-15a.

Like the district court, the court of appeals concluded that Justice Sotomayor's opinion in *Freeman* controlled petitioner's eligibility for a sentence reduction. Pet. App. 5a-14a. It observed that this Court had held in *Marks* v. *United States*, 430 U.S. 188 (1977), that "[w]hen a fragmented [Supreme] Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." Pet. App. 7a (quoting *Marks*, 430 U.S. at 193) (internal quotation marks omitted).

The court of appeals determined that "Justice Sotomayor's opinion in *Freeman* provides the narrowest ground of agreement because her concurring opinion

establishes the least far-reaching rule." Pet. App 8a (brackets and internal quotation marks omitted). It reasoned that the *Freeman* plurality would treat defendants who entered binding pleas under Rule 11(c)(1)(C) as always eligible for a sentence reduction under Section 3582(c)(2), while Justice Sotomayor would treat such defendants as sometimes eligible. *Ibid.* Justice Sotomayor's opinion, the court concluded, was controlling because it "provides a legal standard that produces results with which a majority of the Court in *Freeman* would agree." *Id.* at 12a. The court noted that its analysis accorded with the decisions of eight other circuits. *Id.* at 9a.

The court of appeals observed that "two circuits deviate from this majority view" on the ground that a divided decision of this Court establishes no precedent for future cases unless one of the opinions supporting the disposition was "a 'logical subset' of another, broader opinion" with which it shared a common rationale. Pet. App. 9a-10a (citations omitted). The court concluded that the common-rationale requirement was inconsistent with this Court's statements in *Marks* and with this Court's application of the *Marks* rule. *Id.* at 10a-12a.

After analyzing petitioner's plea agreement, the court of appeals found no error in the district court's determination that petitioner was ineligible for relief under Justice Sotomayor's framework. Pet. App. 14a-15a.

6. Petitioner sought certiorari, arguing that "[t]he lower courts are hopelessly confused over how to apply *Marks*," leading to divergence in the application of decisions like *Freeman*, and that "[t]his court should address the *Marks* question now." Pet. 1; see Pet. 10-31.

SUMMARY OF ARGUMENT

This case presents a circuit conflict concerning whether this Court's divided decisions have precedential effect when a majority of this Court reaches a result, but divides on reasoning. This Court should decide this case by resolving that conflict and reaffirming the rule of *Marks* v. *United States*, 430 U.S. 188, 193 (1977), that divided decisions establish binding precedent without regard to whether a majority of Justices share common reasoning. Because the court of appeals acted in accordance with that principle when it found petitioner ineligible for a sentence reduction in light of this Court's decision in *Freeman* v. *United States*, 564 U.S. 522 (2011), its decision should be affirmed. If this Court elects instead to reconsider *Freeman*, it should hold that a defendant who pleads guilty in exchange for a specific sentence pursuant to an agreement under Rule 11(c)(1)(C) of the Federal Rules of Criminal Procedure is not eligible for a sentence reduction under 18 U.S.C. 3582(c)(2), because his sentence is not "based on" a subsequently lowered Guidelines range, *ibid.*

I. The court of appeals correctly treated this Court's decision in *Freeman* as precedential under *Marks* even though no single rationale in *Freeman* drew the support of a majority of this Court.

A. *Marks* set out a rule for determining the governing law "[w]hen a fragmented Court decides a case, and no single rationale explaining the result enjoys the assent of five Justices." 430 U.S. at 193. In such cases, "the holding of the Court may be viewed as that position taken by those members who concurred in the judgments on the narrowest grounds." *Ibid.* (citation omitted). In applying *Marks*, this Court has either identified a specific opinion that generates results with which

five Justices would agree or simply analyzed whether a litigant would have prevailed under the rationales of at least five Justices by running the facts through multiple opinions. Either approach ensures that lower courts decide cases in a manner consistent with the views of a majority of Justices in the relevant precedent.

Marks reflects sound principles of judicial administration. It implements the basic principle that lower courts must decide cases in conformity with decisions of this Court. It ensures evenhanded treatment of similarly situated litigants. And it enables this Court to give constitutional and statutory provisions the same application nationwide—even when Members of this Court disagree on the reasoning behind that application.

B. Petitioner's challenges to the application of *Marks* in his case are unsound.

Petitioner's contention that a decision of this Court has no precedential effect unless at least five Justices supporting the judgment do so based on common reasoning cannot be reconciled with *Marks* and other decisions. *Marks* directly stated that its interpretive guidance applies when "no single rationale explaining the result enjoys the assent of five Justices." 430 U.S. at 139. And in *Marks* and other decisions, this Court has treated as controlling the opinions that would generate results favored by a majority—even when no common rationale attracted majority support. A common-reasoning requirement, moreover, would disserve the values that underlie this Court's interpretive rules. It would strip this Court of the ability to create nationwide uniformity when Members of this Court reach common results through different rationales. And it

would undermine the evenhanded administration of justice, by subjecting similarly situated litigants to different outcomes.

This Court should also reject petitioner's proposal to replace *Marks* with a rule under which only decisions with majority opinions receive precedential status. That approach would undermine uniformity, evenhandedness, and predictability to an even greater degree than petitioner's shared-reasoning proposal. And the handful of cases petitioner invokes that have found difficulty applying *Marks* to particular decisions do not justify overruling the four-decade-old *Marks* precedent. Courts of appeals have issued more than 400 decisions using *Marks* to construe more than 100 of this Court's precedents, indicating that *Marks*' application is straightforward in the mine-run of cases.

Finally, petitioner is mistaken in contending that *Freeman* has no precedential effect because, in his view, Justice Sotomayor's opinion concurring in the judgment is not narrower than the plurality position in every application. That argument is flawed in its initial premise, because Justice Sotomayor's opinion occupies a middle ground between the plurality and dissent. But in any event, petitioner is mistaken in suggesting that decisions of this Court lack precedential authority unless a single narrowest opinion would generate majority-supported results in all cases. This Court has made clear that when uncertainty exists as to whether a particular opinion qualifies as narrowest under *Marks*, courts may simply determine which litigant should prevail by running a case through multiple opinions to establish which litigant would prevail under the views of five Justices. Petitioner does not dispute that

he is ineligible for a sentence reduction under that approach.

II. Should this Court elect to resolve petitioner's case by reconsidering the question presented in *Freeman*, it should likewise affirm the decision below. A defendant who pleads guilty in exchange for a specific sentence under a Rule 11(c)(1)(C) agreement is not eligible for a sentence reduction under 18 U.S.C. 3582(c)(2), because his sentence is not "based on" a subsequently lowered Guidelines range, *ibid.*

Section 3582(c)(2) permits a district court to "reduce the term of imprisonment" of a defendant who had been "sentenced to a term of imprisonment based on a sentencing range that has been subsequently lowered by the Sentencing Commission." 18 U.S.C. 3582(c)(2). A defendant who pleads guilty in exchange for a specific sentence under Rule 11(c)(1)(C), and receives the sentence in his plea agreement, does not satisfy that requirement. As five Justices concluded in *Freeman*, the sentence of such a defendant is "based on" the plea agreement, not on the defendant's Guidelines range. This Court's decisions holding that a claim is "based upon" only its core or fundamental basis, *OBB Personenverkehr AG* v. *Sachs*, 136 S. Ct. 390 (2015); *Saudi Arabia* v. *Nelson*, 507 U.S. 349 (1993), make clear that the term "based on" in Section 3582(c)(2) refers to a sentence's legal foundation, not to other factors that might fall somewhere along the causal chain leading to the sentence's imposition. When a defendant pleads guilty pursuant to Rule 11(c)(1)(C), the parties' sentencing agreement binds the district court once it accepts the plea agreement, whether or not the stipulated sentence or sentencing range correlates to the defendant's Guidelines range.

The Sentencing Commission's implementation of its authority to constrain the availability of sentence reductions separately precludes sentence reductions for defendants who receive specific sentences pursuant to Rule 11(c)(1)(C) plea agreements. The binding policy statement in Sentencing Guidelines § 1B1.10(b)(1) allows a reduction only to account for the amendment of a Guideline that was "applied when the defendant was sentenced." But when a defendant is sentenced under a Rule 11(c)(1)(C) agreement to a specific sentence, the Guidelines are not "applied" at sentencing with respect to that component of the sentence.

Petitioner's construction of Section 3582(c)(2) and Section 1B1.10 would give defendants an unwarranted windfall by allowing them to retain—and improve upon—the benefits of their plea agreements while depriving the government of its own benefits under those bargains. In exchange for the certainty of a specific sentence under Rule 11(c)(1)(C), the government often makes substantial concessions: it agrees to give up the right to seek a sentence higher than the one specified in the agreement and, as this case illustrates, may also dismiss charges and forgo available enhancements. Section 3582(c)(2) does not permit a defendant to hold the government to its concessions yet seek to relieve himself of his own.

ARGUMENT

The conflict among the courts of appeals presented by this case and pressed in the petition for a writ of certiorari concerns the extent to which lower courts are bound by decisions of this Court when no single opinion attracted the support of a majority of Justices. Most circuits treat such decisions as establishing binding law under the rule set forth in *Marks* v. *United States*,

430 U.S. 188, 193 (1977), and decide cases in a manner consistent with the views of at least five Members of this Court in the divided case. That approach serves nationwide uniformity and ensures that similarly situated litigants are treated alike. Petitioner, however, urges this Court to adopt a minority approach under which the Court's decisions in *Freeman* v. *United States*, 564 U.S. 522 (2011), and other divided cases would result in no binding law at all. That approach cannot be squared with *Marks* or sound principles of judicial administration and should be rejected.

Petitioner's suggestion (Br. 10, 12, 37) that this Court resolve this case by reconsidering *Freeman*, rather than by applying *Marks*, is contrary to the thrust of petitioner's argument at the certiorari stage. See, *e.g.*, Pet. Cert. Reply Br. 8. And it would render irrelevant to the disposition of petitioner's case the *Marks* conflict that petitioner urged this Court to resolve. But should this Court elect to resolve this case by reconsidering *Freeman*, it should affirm the decision below. A defendant who pleads guilty in exchange for a specific sentence under Federal Rule of Criminal Procedure 11(c)(1)(C) is not eligible for a sentence reduction under 18 U.S.C. 3582(c)(2), because his sentence is not "based on" a subsequently lowered Guidelines range, *ibid.*

I. THE COURT OF APPEALS CORRECTLY DETERMINED THAT PETITIONER IS INELIGIBLE FOR A SENTENCE REDUCTION BY APPLYING THIS COURT'S PRECEDENT

The court of appeals' decision should be affirmed on the ground that it represents a correct application of this Court's rule in *Marks* to the divided decision in *Freeman*. Petitioner does not dispute that, under the approaches of five Justices in *Freeman*—including under Justice Sotomayor's middle-ground concurrence—

he is not eligible for a sentence reduction under 18 U.S.C. 3582(c)(2). Accordingly, the lower courts correctly denied him relief.

A. *Marks* Gives Divided Decisions Of This Court Binding Effect In Future Cases

1. In *Marks*, this Court provided a rule for determining the governing law established by a decision in which the Members of the Court do not agree on a rationale. "When a fragmented Court decides a case, and no single rationale explaining the result enjoys the assent of five Justices," *Marks* held, "'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'" 430 U.S. at 193 (quoting *Gregg* v. *Georgia*, 428 U.S. 153, 169 n.15 (1976) (opinion of Stewart, Powell, and Stevens, JJ.)). Because an opinion "concurr[ing] in the judgments on the narrowest grounds" occupies a "middle ground" between Justices with broader and narrower views, *Marks* ensures that "lower courts will decide cases consistently with the opinions of a majority of the Supreme Court in the relevant precedent." *United States* v. *Duvall*, 740 F.3d 604, 610 (D.C. Cir. 2013) (Kavanaugh, J., concurring in the denial of rehearing en banc).

This Court, in applying *Marks*, has not invariably required that one single opinion itself encapsulate the Court's holding. Often, as in *Marks* itself, the Court has designated as controlling a middle-ground opinion falling between plurality and dissenting views that produces results accepted by five Justices in every case. See, *e.g.*, *Graham* v. *Florida*, 560 U.S. 48, 59-60 (2010); *Panetti* v. *Quarterman*, 551 U.S. 930, 949 (2007); *Marks*, 430 U.S. at 193. On other occasions, however,

this Court has taken a different route to the same basic result—asking which litigant would have prevailed under the rationales of at least five Justices by running the facts at hand through multiple opinions. See, *e.g.*, *Bobby* v. *Dixon*, 565 U.S. 23, 30-32 (2011) (per curiam); *City of Ontario* v. *Quon*, 560 U.S. 746, 757 (2010) (plaintiff's claim failed because "two * * * approaches—the plurality's and Justice Scalia's"—each indicated that the plaintiff was not entitled to relief); see also, *e.g.*, *United States* v. *Jacobsen*, 466 U.S. 109, 115-117 (1984) (determining that an earlier case established that "the legality of [a] governmental search must be tested by the scope of the antecedent private search" because that proposition was accepted by a single-Justice concurrence and a four-Justice dissent); *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 16-17 (1983) (similar). Both methods decide cases consistently with the views of a majority of this Court.

2. The *Marks* approach reflects sound principles of judicial administration. This Court decides cases in the manner supported by five Justices, even if Members of this Court divide as to reasoning—affirming lower-court judgments that are consistent with the views of a majority of Justices, and reversing lower-court judgments that are not. See, *e.g.*, *Freeman*, 564 U.S. at 534 (opinion of Kennedy, J.). The *Marks* rule ensures that such decisions of this Court are not just good for one day only. It guarantees that lower courts resolve future cases in the way that they would have been resolved if this Court had granted review. *Marks* thereby implements the judicial-hierarchical principle sometimes referred to as "[v]ertical stare decisis," which "requires lower courts to follow applicable Supreme Court rulings

in every case." *Duvall*, 740 F.3d at 609 (Kavanaugh, J., concurring in the denial of rehearing en banc).

In doing so, *Marks* serves the purposes that underlie this Court's interpretive rules more generally, by "'promot[ing] the evenhanded, predictable, and consistent development of legal principles, foster[ing] reliance on judicial decisions,'" and "sav[ing] parties and courts the expense of endless relitigation." *Kimble* v. *Marvel Entm't, LLC*, 135 S. Ct. 2401, 2409 (2015) (citation omitted). It facilitates the "evenhanded" and "consistent" administration of justice between similarly situated litigants, *ibid.* (citation omitted), by ensuring that "whether the majority vote is produced by the adoption of one rationale or two, the rule of law made" in a decision of this Court will "produce the same result in the next applicable case," *United States* v. *Davis*, 825 F.3d 1014, 1036 (9th Cir. 2016) (en banc) (Bea, J., dissenting). And it enhances this Court's ability to provide "predictable" and "consistent" meaning to federal law, *Kimble*, 135 S. Ct. at 2409 (citation omitted), by enabling this Court to create national uniformity on the scope of statutory and constitutional provisions when a majority of this Court embraces a particular result, even if Members of the Court diverge in their reasoning. That is critical because federal constitutional and statutory provisions are "generally intended to have uniform nationwide application." *Mississippi Band of Choctaw Indians* v. *Holyfield*, 490 U.S. 30, 43 (1989) (discussing statutes); see *Martin* v. *Hunter's Lessee*, 14 (1 Wheat.) U.S. 304, 347-348 (1816) (discussing the Constitution).

B. The Court of Appeals Correctly Applied The Principles Of *Marks*

The court of appeals correctly applied the principles of *Marks* to this Court's decision in *Freeman* when it concluded that petitioner was not eligible for a reduction in his agreed-upon sentence. The court determined that Justice Sotomayor's opinion, which took an "intermediate position" between the plurality and the dissent, *Freeman*, 564 U.S. at 532 (opinion of Kennedy J.), was the opinion concurring in the *Freeman* judgment on the narrowest ground; that petitioner was not entitled to a sentence reduction under that opinion; and that five Members of the *Freeman* Court would agree with that result. Pet. App. 8a-13a. Petitioner does not dispute that, under the approaches of five Justices in *Freeman*, he is not eligible for a sentence reduction under 18 U.S.C. 3582(c)(2). Instead, he argues that the court of appeals was free to disregard the opinions of five Justices in *Freeman* because, in petitioner's view, *Freeman* established only a judgment and no rule of decision for future cases. Petitioner's arguments are unsound.

1. Petitioner's "common reasoning" approach is mistaken

Petitioner first contends (Br. 38-51) that divided decisions like *Freeman* have no precedential value beyond creating a judgment unless there is "common reasoning" between plurality and concurring opinions. Pet. Br. 45 (requiring "common reasoning" and stating that a concurrence cannot qualify as controlling on the ground that it "produces results with which a majority of the Court would agree") (citation, ellipses, and emphasis omitted); see *id.* at 51 ("Shared results without shared rationales generate only judgments."); see also, *e.g.*, *id.* at 51-52. That argument is contrary to forty

years of precedent and would create unjustifiable disuniformity in the lower courts.

a. *Petitioner's "common reasoning" requirement cannot be squared with* Marks *and other decisions of this Court*

i. *Marks* made plain that its guidance is designed to identify precedential rules in precisely those cases in which petitioner would deem *Marks* inapplicable. *Marks* expressly stated that its narrowest-concurrence rule governs when "*no single rationale explaining the result enjoys the assent of five Justices.*" 430 U.S. at 193 (emphasis added). Petitioner does not address that language in *Marks*. And he points to no passage in any decision of this Court stating that *Marks* applies only when plurality and concurring opinions share "common reasoning," Pet. Br. 45, or treating an analysis of whether common reasoning exists as a precondition to application of the *Marks* rule.

The *Marks* Court's own application of the rule it announced undermines petitioner's reading of that decision even further. *Marks* treated as controlling a three-Justice plurality opinion that took a narrower approach than other opinions, based upon reasoning that was not shared by a majority of the Court. In the prior decision that *Marks* addressed, this Court had divided among multiple approaches to the First Amendment protection of sexually explicit materials. See *A Book Named 'John Cleland's Memoirs of a Woman of Pleasure'* v. *Attorney Gen.*, 383 U.S. 413 (1966) (*Memoirs*). A three-Justice plurality concluded that the book at hand was constitutionally protected because it was not obscene, applying a test focused on whether the book was "utterly without redeeming social value." *Id* at 418 (opinion of Brennan, J.). Justice Stewart found the

book constitutionally protected under a different test. See *id.* at 421; *Mishkin* v. *New York*, 383 U.S. 502, 518 (1966) (Stewart, J., dissenting). Justices Black and Douglas concluded that the book was constitutionally protected on the view that the First Amendment is "an absolute shield against governmental action aimed at suppressing obscenity." *Marks*, 430 U.S. at 193; see *Memoirs*, 383 U.S. at 421; *id.* at 426 (Douglas, J., concurring in the judgment); see also *Ginzburg* v. *United States*, 383 U.S. 463, 476 (1966) (Black, J., dissenting). The three remaining Justices dissented on the ground that the State could treat the work as unprotected obscenity even if it was not without redeeming social value. See *Memoirs*, 383 U.S. at 441-442 (Clark, J., dissenting); *id.* at 455-459 (Harlan, J., dissenting); *id.* at 460-461 (White, J., dissenting).

This Court's determination in *Marks* that *Memoirs*'s plurality "constituted the holding of the Court and provided the governing standards," *Marks*, 430 U.S. at 194, directly contradicts petitioner's conception of the *Marks* rule. The judgment in the case depended on the vote of either Justice Black or Justice Douglas (or both), each of whom rejected the existence of any obscenity framework—including the plurality's. *Marks* itself accordingly recognized that the views in the plurality opinion "never commanded the assent of more than three Justices." *Id.* at 192.

Petitioner seeks to reconcile *Marks'* application of the *Marks* doctrine with his position by asserting that "Justice Black and Douglas had to agree, as a logical consequence of their own position" with the plurality's view that "anything with redeeming social value is not obscene." Pet. Br. 41 (citation omitted). But that is a shared-results analysis, not the shared-reasoning rule

that petitioner advocates. While Justice Black's and Justice Douglas's repudiation of obscenity doctrine meant they would agree with the result of any opinion finding First Amendment protection on any basis, Justices Black and Douglas disavowed the social-value-based reasoning that the plurality used. As one commentator has put it, those Justices "would never have accepted the plurality's three-part obscenity test, or any other obscenity test for that matter." Mark Alan Thurmon, *When the Court Divides: Reconsidering the Precedential Value of Supreme Court Plurality Decisions*, 42 Duke L.J. 419, 432 (1992).

ii. Petitioner's shared-reasoning requirement is equally irreconcilable with *Gregg*, where the *Marks* rule originated. *Gregg* addressed the rule to be drawn from *Furman* v. *Georgia*, 408 U.S. 238 (1972) (per curiam), in which five Justices wrote separate opinions concluding that application of Georgia's death-penalty statute was unconstitutional. *Gregg*, 428 U.S. at 169 & n.15. Justices Brennan and Marshall concluded that the death penalty was always unconstitutional. *Furman*, 408 U.S. at 305-306 (Brennan, J., concurring); *id.* at 370-371 (Marshall, J. concurring). Three other Justices found Georgia's death-penalty scheme unconstitutional as applied: Justices Stewart and White because the penalty was imposed on "a capriciously selected random handful" of defendants, *id.* at 309-310 (Stewart, J., concurring); see *id.* at 313 (White, J., concurring), and Justice Douglas because the penalty was imposed in a discriminatory manner, *id.* at 255-257 (Douglas, J., concurring). Although the five opinions "certainly did not have a 'common rationale,'" *Duvall*, 740 F.3d at 613 n.3 (Kavanaugh, J., concurring in the denial of rehearing en banc), the *Gregg* plurality nevertheless determined that

Justice Stewart and Justice White's approach was controlling, because "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds," *Gregg*, 428 U.S. at 169 n.15.

Petitioner attempts to square *Gregg* with his shared-reasoning requirement (Br. 41-42) by observing that some Justices in *Gregg* "held a law to be facially unconstitutional and others thought it constitutional in certain applications." But again, that shows only that five Justices agreed on the results in cases where those constitutional theories intersected—not that the relevant Justices shared common reasoning. In fact, the Justices writing narrow opinions applied different reasoning than the Justices writing categorical ones. Compare *Furman*, 408 U.S. at 305-306 (Brennan, J., concurring) (concluding that capital punishment was unconstitutional as offensive to human dignity, in light of various factors) and *id.* at 358-360 (Marshall, J., concurring) (concluding that capital punishment was unconstitutional because it was "excessive and unnecessary" and "morally unacceptable"), with *id.* at 309-310 (Stewart, J., concurring) (finding Georgia's application of the death penalty to violate the Eighth Amendment because the penalty is "freakishly imposed" on a "capriciously selected random handful") and *id.* at 313 (White, J., concurring) (similarly concluding that Georgia's application of the death penalty was unconstitutional because "the death penalty is exacted with great infrequency even for the most atrocious cases and there is no meaningful basis for distinguishing the few cases in which it is imposed from the many in which it is not").

iii. This Court's later applications of *Marks* are equally irreconcilable with petitioner's shared-reasoning requirement.

Graham, *supra*, for example, identified a controlling opinion for this Court from a decision in which the Court's divided opinions adopted divergent reasoning. Two Justices in *Harmelin* v. *Michigan*, 501 U.S. 957 (1991), in an opinion by Justice Scalia, rejected a defendant's Eighth Amendment challenge to the proportionality of his sentence on the ground that "the Eighth Amendment contains no proportionality guarantee" in non-capital cases. *Id.* at 965; see *id.* at 994. Three Justices concurred, but they explained that their "approach to the Eighth Amendment proportionality analysis differ[ed]" from the approach in Justice Scalia's opinion; those Justices concluded that the Eighth Amendment barred "grossly disproportionate" sentences in the non-capital context and that the petitioner's sentence was constitutional under that standard. *Id.* at 996-997 (Kennedy, J., concurring in part and concurring in the judgment); see *id.* at 1005. Three dissenting Justices applied a more stringent Eighth Amendment test and concluded that the petitioner's sentence was unconstitutional. *Id.* at 1009-1027 (White, J., dissenting). Although the "narrow proportionality" principle of the plurality was not shared by the other opinions in *Harmelin*, each of the opinions in *Graham* treated the plurality opinion taking a middle-ground approach as the "controlling" opinion on proportionality. *Graham*, 560 U.S. at 59-60; see *id.* at 85 (Stevens, J., concurring); *id.* at 87 (Roberts, C.J., concurring in the judgment); *id.* at 104 (Thomas, J., dissenting); *id.* at 124-125 (Alito, J., dissenting).

Similarly, if petitioner's shared-reasoning requirement were correct, this Court would not have held that Justice White's concurring opinion in *Gardner* v. *Florida*, 430 U.S. 349 (1977), constituted controlling law. See *O'Dell* v. *Netherland*, 521 U.S. 151, 162 (1997) (describing Justice White's concurrence as "the rule of *Gardner*" under *Marks*). This Court concluded that Justice White's opinion was controlling because it "provid[ed] the narrowest grounds of decision among the Justices whose votes were necessary to the judgment." *Id.* at 160 (citing *Marks*, 430 U.S. at 193). But Justice White's opinion differed from the three-Justice plurality opinion, which was also necessary to the disposition of the case, not only in its reasoning but in the very constitutional amendment on which it was premised. See *Gardner*, 430 U.S. at 351, 358-362 (opinion of Stevens, J.) (plurality finding deprivation of due process of law); *id.* at 362-363 (opinion of White, J., concurring in the judgment) (finding violation of the Eighth Amendment).

iv. The decisions on which petitioner relies (Br. 45-46) provide no support for his position. None addresses (as *Marks* does) how lower courts should apply a decision that generates a majority disposition but not a majority opinion.

The Court in *Seminole Tribe* v. *Florida*, 517 U.S. 44 (1996), stated that lower courts must give precedential effect to both the result and the reasoning of a majority opinion. *Id.* at 67 ("When an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which we are bound."). But it neither considered the precedential effect of decisions without majority opinions nor suggested that when a particular result is supported by a majority of this Court, a lower court is free to disregard

this Court's decision if the Members of this Court did not agree on a rationale.

And the Court in *Hertz* v. *Woodman*, 218 U.S. 205 (1910), explained that decisions of this Court have no precedential effect when a majority does not even agree on the proper result, and thus leaves a lower court decision in effect through an affirmance by an equally divided court. *Id.* at 213-214. Such cases, *Hertz* explained, cannot be said to reflect any majority agreement on "principles of law involved." *Id.* at 213. In contrast, the divided decisions that *Marks* addresses do reach a result, and thus a holding, on the question before the Court. And, such decisions—unlike affirmances by an equally divided court—make it possible for lower courts to decide future cases in a manner that a majority of this Court would favor.

b. Petitioner's "common reasoning" approach is unsound

"[T]he idea that a court's holding, adopted by a majority of judges, must have a rationale common throughout the majority" to create binding authority is inconsistent with how the judicial system ordinarily operates. *Davis*, 825 F.3d at 1036 (Bea, J., dissenting). This Court should not replace *Marks* with an approach that demands that sort of common rationale in order for this Court's divided decisions to have precedential effect.

i. As previously noted, this Court has emphasized the importance of interpretive rules that give federal statutes "predictable" and "consistent" meanings. *Kimble*, 135 S. Ct. at 2409 (citation omitted); see *Holyfield*, 490 U.S. at 43; cf. Sup. Ct. R. 10. Under petitioner's approach, however, constitutional and statutory provisions addressed by this Court could well carry

dramatically different interpretations across the country, which would persist so long as the composition of the Court remained stable, unless a Justice experienced a change of heart or signed onto reasoning that the Justice did not accept. And on constitutional questions, no other branch of the government could restore nationwide uniformity absent a constitutional amendment.

Similarly, while this Court has stressed the importance of "evenhanded" administration of justice, *Kimble*, 135 S. Ct. at 2409 (citation omitted), under petitioner's approach, similarly situated litigants would face different outcomes depending on whether their case happened to be the one in which this Court granted certiorari. The defendant in *Freeman*, for example, would obtain relief, but a co-defendant whose case presented the same issue would be out of luck, simply because his case did not happen to be the vehicle in which certiorari was granted. Indeed, under petitioner's approach, even a co-defendant whose petition for certiorari was pending in this Court at the same time as Freeman's could be denied relief. If this Court followed its usual practice of granting the co-defendant's petition, vacating the decision below, and remanding the case for further consideration, the lower court could deny relief without applying *Freeman* because, under petitioner's approach, the division of reasoning in *Freeman*'s opinions would deprive that decision of precedential effect. Cf. *Goins* v. *United States*, 564 U.S. 1051 (2011) (granted, vacated, and remanded in light of *Freeman*); *Rivera-Martinez* v. *United States*, 564 U.S. 1051 (2011) (same); *Carrigan* v. *United States*, 564 U.S. 1051 (2011) (same). The *Marks* rule recognizes that such a regime is unacceptable in circumstances where the agreement

of a majority of the Court on a particular legal outcome can be ascertained.

ii. None of petitioner's arguments justifies abandoning the *Marks* rule in favor of a common-reasoning requirement.

Petitioner contends that it is irrational for a concurring opinion with a unique rationale to be treated as controlling under *Marks*, asserting that such application of the *Marks* rule "would turn a single opinion that lacks majority support into national law." Pet. Br. 42 (citation and internal quotation marks omitted). But giving effect to a middle-ground concurrence that produces outcomes supported by five Justices does not privilege the views of a single Justice. Instead, it produces outcomes with which a majority of this Court agrees and is consistent in each application with the reasoning of not only the concurrence's author but also at least four other Justices.

Second, petitioner suggests (Br. 45) that administrability considerations support a shared-reasoning analysis. But the *Marks* rule is not especially difficult to apply, and, at minimum, it is more administrable than petitioner's shared-reasoning test. Petitioner suggests that "run[ning] the facts and circumstances of the current case through [each of] the tests articulated in the Justices' various opinions," Pet. Br. 49 (citation omitted), involves a "high degree of difficulty," *id.* at 48. But applying legal reasoning articulated by Members of this Court to particular facts and circumstances is a familiar task for lower courts. It is exactly what they do in applying this Court's majority opinions. Petitioner provides no reason why that task becomes "a project fit for oracles" in plurality cases, *id.* at 49, simply because it

involves more than one opinion. Lower courts are readily able to apply their expertise to determine whether two tests, rather than just one, are satisfied on a particular set of facts. Although some factual patterns may present hard cases or be indeterminate under particular decisions, that is also the case for decisions with majority opinions.

Petitioner's shared-reasoning approach would be much harder to administer than *Marks*. Petitioner would replace the familiar task of applying opinions to particular facts with a vague inquiry that has no parallel to the functions that lower courts usually perform—namely, ascertaining whether the reasoning in one opinion is properly described as "subsumed by that of another." Pet. Br. 44. When Justices reach the same result without a majority opinion, their reasoning will almost certainly be similar in some respects and dissimilar in other respects. Petitioner would increase the complexity of lower courts' responsibilities by replacing a familiar inquiry into bottom-line outcomes with an uncertain inquiry into the extent of divergence in opinions' reasoning.

2. This Court should not replace* Marks *with a rule under which only majority opinions have precedential effect

This Court should decline petitioner's alternative suggestion that it overrule *Marks* and replace its rule with one under which "only opinions joined by a majority of Justices" receive "precedential status." Pet. Br. 55 (emphasis omitted); see *id.* at 55-59. Replacing *Marks* with a majority-only rule would undermine uniformity, evenhandedness, and predictability, *Kimble*, 135 S. Ct. at 2409, to an even greater degree than petitioner's shared-reasoning proposal, by giving precedential weight to even fewer of this Court's decisions.

Petitioner offers no sound reason to replace the more-than-40-year-old *Marks* rule with a majority-only rule notwithstanding those costs.[1] Petitioner principally asserts that *Marks* is "unworkable" and has created "disarray" in the lower courts, Pet. Br. 57 (citation and internal quotation marks omitted), relying heavily on a handful of cases noting difficulty in applying *Marks* to particular decisions. See, *e.g.*, *Nichols* v. *United States*, 511 U.S. 738, 745 (1994) (stating that the *Marks* "test is more easily stated than applied *to the various opinions supporting the result in*" *Baldasar* v. *Illinois*, 446 U.S. 222 (1980) (per curiam)) (emphasis added).

But the existence of some difficult cases does not justify abandoning the *Marks* rule. Courts of appeals have issued more than 400 decisions in the past several decades applying *Marks* to interpret more than 100 divided decisions of this Court. Richard M. Re, *Beyond the Marks Rule* 11 (Jan. 5, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3090620. Their ability to apply *Marks* in this way demonstrates that *Marks* is not

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[1] Petitioner states (Pet. Br. 58) that overruling *Marks* would constitute "a return to the historical norm" before that decision. But the precedential status of divided decisions before *Marks* "was unclear." *Duvall*, 740 F.3d at 610 (Kavanaugh, J., concurring in the denial of rehearing en banc) (citing Joseph M. Cacace, Note, *Plurality Decisions in the Supreme Court of the United States: A Reexamination of the* Marks *Doctrine After* Rapanos *v.* United States, 41 Suffolk U. L. Rev. 97, 104-105 (2007); Justin Marceau, *Plurality Decisions: Upward-Flowing Precedent and Acoustic Separation*, 45 Conn. L. Rev. 933, 948-949 (2013)); see Comment, *Supreme Court No-Clear-Majority Decisions: A Study in* Stare Decisis, 24 U. Chi. L. Rev. 99, 101 & n.12 (1956); *id.* at 101-153 (cataloguing decisions and interpretations); see also Linda Novak, Note, *The Precedential Value of Supreme Court Plurality Decisions*, 80 Colum. L. Rev. 756, 767-778 (1980).

difficult to apply in the mine-run of cases. Cf. *Duvall*, 740 F.3d at 611 (Kavanaugh, J., concurring in the denial of rehearing en banc) ("In interpreting most splintered Supreme Court decisions, the *Marks* rule is not especially complicated."). To the extent that courts sometimes struggle with identifying a single narrowest opinion, see, *e.g.*, *Nichols*, 511 U.S. at 745, this Court can make their work easier by making clear that they can simply determine which litigant would prevail in the case at hand under the approaches of at least five Justices, as this Court itself has done.

3. **Freeman *does not lack precedential effect on the theory that no single opinion in that case qualifies as the narrowest***

Petitioner alternatively argues (Br. 52-55) that this Court's decision in *Freeman* has no precedential effect because, in his view, the "intermediate position" in Justice Sotomayor's opinion concurring in the judgment, *Freeman*, 564 U.S. at 532 (opinion of Kennedy, J.), is not narrower than the plurality position in every application. In making that argument, petitioner does not dispute that he himself would be ineligible for a sentence reduction under Justice Sotomayor's intermediate approach, or that the application of Justice Sotomayor's approach in his case yields an outcome supported by five Justices. Instead, he contends that because he can posit *other* idiosyncratic cases in which, in his view, Justice Sotomayor's opinion would not achieve a majority result, *Freeman* lacks precedential authority in *any* case. That contention misunderstands both the opinions in *Freeman* and the inquiry under *Marks*.

a. As a threshold matter, petitioner's argument is flawed in its premise that Justice Sotomayor's opinion

does not reflect an intermediate position that will always achieve majority-favored results. As the courts of appeals that apply a shared-results approach to *Marks* have concluded, the opinions in *Freeman* can be described as taking "always," "sometimes," and "never" approaches to the eligibility of Rule 11(c)(1)(C) defendants for sentence reductions under Section 3582(c)(2), with Justice Sotomayor's approach embracing the "middle ground between 'always' and 'never,'" *Duvall*, 740 F.3d at 612 (Kavanaugh, J. concurring in the denial of rehearing en banc); see Pet. 18-19 (compiling cases). Petitioner errs in asserting the existence of rare cases in which Justice Sotomayor would allow a sentence reduction but the plurality would not.

Petitioner first posits (Br. 53-54) a situation in which (i) the plea agreement "incorporates the Guidelines and settles on a Guidelines range"; (ii) the district court rejects the stipulated range on policy grounds; but (iii) the court nevertheless imposes the stipulated sentence for reasons unrelated to the Guidelines range. But contrary to petitioner's suggestion, the plurality as well as the concurrence would permit a sentence reduction in that circumstance. The plurality indicated that, in its view, a Guidelines range that the sentencing court is legally required to consider may be deemed the basis of a sentence even when a court decided to deviate from it. See *Freeman*, 564 U.S. at 529-530 (opinion of Kennedy, J.) ("Even where the judge varies from the recommended range * * * if the judge uses the sentencing range as the beginning point to explain the decision to deviate from it, then the Guidelines are in a real sense a basis for the sentence."); see also *Davis*, 825 F.3d at 1037-1038 (Bea, J., dissenting); *Duvall*, 740 F.3d at 614-

617 (Kavanaugh, J., concurring in the denial of rehearing en banc).

Petitioner additionally posits (Br. 54) that Justice Sotomayor would allow relief but the plurality would not in an unusual case in which (i) the Rule 11(c)(1)(C) agreement "invokes the Guidelines and recommends a sentence at the bottom of a specified range"; (ii) the district court finds that the parties applied the wrong Guideline; but (iii) the court accepts the agreement and imposes the stipulated sentence. Again, however, the plurality and Justice Sotomayor would treat that situation similarly. Neither approach would generally consider a sentence to be "based on" a legal mistake, or a legally irrelevant consideration. See *Freeman*, 564 U.S. at 530 (opinion of Kennedy, J.); *id.* at 535 (Sotomayor, J., concurring in the judgment). But to the extent that an incorrectly calculated Guidelines range could become "the basis or foundation for the term of imprisonment" under Justice Sotomayor's approach because the court was legally required to consider it by virtue of its incorporation in a Rule 11(c)(1)(C) agreement, *id.* at 535, it would also be "a relevant part of the analytic framework" under the plurality's approach, *id.* at 530 (opinion of Kennedy, J.).

b. In any event, because no dispute exists that five Justices in *Freeman* would have found petitioner ineligible for a sentence reduction, petitioner was not eligible for such a reduction regardless of the outcome of the alternative cases that he posits. This Court has made clear that one permissible method of discerning whether a litigant should prevail under *Marks* is simply to run the facts of the case through multiple opinions to determine whether the litigant would win or lose under the views of five Justices. See, *e.g.*, *Dixon*, 565 U.S. at 31-32

(concluding that a litigant would have lost under the approach of the plurality and the approach of a single-Justice concurrence); *Quon*, 560 U.S. at 757; cf. *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 16-17 (finding a proposition established because the concurring and dissenting opinions formed a majority in support of that proposition).

Significantly, this Court has used that simple approach when some question existed as to which single opinion should be deemed controlling. In *Quon*, the Court found that because a plaintiff would not be entitled to relief under the approaches of five Justices in a prior decision, no need existed to identify a particular opinion from that decision as the narrowest. See 560 U.S. at 757 (stating that while "petitioners and respondent start from the premise that the *O'Connor* plurality controls * * * [i]t is not necessary to resolve whether that premise is correct" because "[t]he case can be decided by determining that the search" at issue was reasonable under both the plurality and concurrence approaches).

Indeed, it is "common sense" that in the "rare no-narrowest-opinion cases, the lower court still must strive to reach the result that a majority of the Supreme Court would have reached in the current case, if such a result can be ascertained," instead of treating this Court's precedent as non-binding. *Duvall*, 740 F.3d at 616 (Kavanaugh, J., concurring in the denial of rehearing en banc). Petitioner offers no sound reason why, "[b]ecause Justice Sotomayor's approach would allegedly lead to relief in some small subset of Section 3582(c)(2) cases where the other eight Justices would deny relief," lower courts should be liberated in every case to follow any approach—even when "a majority of

the Supreme Court would definitely disagree with the result achieved" by doing so. *Ibid.*

Petitioner's interpretation of *Marks*, moreover, would make its application much more complex. Lower courts would be unable to resolve cases by determining how this Court would decide them. Instead, they would have to figure out how various Justices of this Court would decide *every* case in order to determine whether to give a divided decision of this Court precedential weight in *any* case. Petitioner's own case illustrates how he would turn easy cases into hard ones. Despite the absence of disagreement about how each of the opinions in *Freeman* would resolve his straightforward case, he would have the result of his case turn on a court's assessment of every idiosyncratic hypothetical that a litigant or judge might posit.

II. DEFENDANTS WHO PLEAD GUILTY IN EXCHANGE FOR SPECIFIC SENTENCES PURSUANT TO RULE 11(c)(1)(C) ARE NOT ELIGIBLE FOR SENTENCE REDUCTIONS UNDER 18 U.S.C. 3582(c)(2)

Deciding petitioner's case based upon *Marks*, as petitioner urged at the certiorari stage, would resolve the circuit conflict presented in this case and clarify the application of Section 3582(c)(2) to future Rule 11(c)(1)(C) defendants. But if this Court instead elects to decide petitioner's case by revisiting the issue addressed in *Freeman*—a course that would render the *Marks* question irrelevant to petitioner's case[2]—it should hold that

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[2] Petitioner's case would be removed from *Marks*' domain not only if this Court reconsidered *Freeman* and reached a majority opinion but also if this Court decided the application of *Freeman* to petitioner's case in divided opinions. That is because, irrespective of how *Marks* is understood, this Court's decisions in divided cases generate binding judgments in the case at hand. See, *e.g.*, *Freeman*,

defendants who plead guilty pursuant to Rule 11(c)(1)(C) are ineligible for Section 3582(c)(2) sentence reductions because their sentences are "based on" their binding plea agreements, not the Sentencing Guidelines.

A. Section 3582(c)(2) Represents A Narrow Exception To The Rule That A Sentence Of Imprisonment May Not Be Modified

As this Court has repeatedly recognized, finality is "essential to the operation of our criminal justice system." *Teague* v. *Lane*, 489 U.S. 288, 309 (1989) (plurality opinion); see *United States* v. *Frady*, 456 U.S. 152, 166 (1982). Once a sentence becomes final, a district court may not alter that sentence except as Congress allows. See, *e.g.*, *United States* v. *Addonizio*, 442 U.S. 178, 189 & n.16 (1979).

Consistent with those principles, Congress has provided that a court generally "may not modify a term of imprisonment once it has been imposed." 18 U.S.C. 3582(c). That command is subject to three narrow exceptions, designed to serve as "safety valves" for prisoners serving already-imposed sentences. S. Rep. No. 225, 98th Cong., 1st Sess. 121 (1983) (1983 Senate Report).

The exception in 18 U.S.C. 3582(c)(2) provides that a court "may reduce the term of imprisonment" of a defendant who was "sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission." Before granting such a reduction, the court must consider the sen-

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564 U.S. at 534 (opinion of Kennedy, J.) (reversing judgment below in divided case); Pet. Br. 51 (acknowledging that cases endorsing "[s]hared results without shared rationales" generate binding judgments in the case at hand).

tencing factors set out in 18 U.S.C. 3553(a), "to the extent that they are applicable." 18 U.S.C. 3582(c)(2). The statute also instructs that such a reduction cannot be granted unless it "is consistent with applicable policy statements issued by the Sentencing Commission." *Ibid.* As the Court observed in *Dillon* v. *United States*, 560 U.S. 817 (2010), "Section 3582(c)(2)'s text, together with its narrow scope, shows that Congress intended to authorize only a limited adjustment to an otherwise final sentence and not a plenary resentencing proceeding." *Id.* at 826.

B. Defendants Who Plead Guilty In Exchange For Specific Sentences Under Rule 11(c)(1)(C) Plea Agreements Are Sentenced "Based On" Their Plea Agreements, Not Based On Any Guidelines Range

The exception to sentence finality in Section 3582(c)(2) does not apply to defendants who plead guilty in exchange for specific sentences under Rule 11(c)(1)(C) plea agreements, because such defendants are sentenced "based on" their plea agreements, not based on any Sentencing Guidelines range.

1. A defendant's sentence is "based on" a calculation of the Guidelines range only when that calculation is the foundation of the defendant's sentence

"When interpreting a statute," the Court "give[s] words their ordinary or natural meaning." *Pasquantino* v. *United States*, 544 U.S. 349, 356 (2005) (quoting *Leocal* v. *Ashcroft*, 543 U.S. 1, 9 (2004)). Here, the natural meaning of "based on" refers to the legal foundation of a sentence.

The verb phrase to "base on" or to "base upon" means "to use as a base or basis for," and the noun "base" means "the fundamental part of something:

basic principle." *Webster's Third New International Dictionary* 180 (1981) (definition 2 of verb "base"; definition 3a of noun "base"); see *The American Heritage Dictionary* 148 (4th ed. 2000) (definition 4 of noun "base": "[t]he fundamental principle or underlying concept of a system or theory"); 1 *The Oxford English Dictionary* 977 (2d ed. 1989) (definition 2.a of noun "base": "*fig[urative]* Fundamental principle, foundation, groundwork"; sense II of noun "base": "The main or most important element or ingredient, looked upon as its fundamental part."); *Webster's New International Dictionary* 225 (2d ed. 1957) (definition 4.a of "base": "[t]he main or chief ingredient of anything, viewed as its fundamental element or constituent"). In accordance with that standard definition, this Court has held on multiple occasions that a cause of action is "based upon" only the events that provide the foundation for the elements of the legal claim—not any other events that may be causally connected to the cause of action.

In *Saudi Arabia* v. *Nelson*, 507 U.S. 349 (1993), this Court considered a clause in the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. 1602 *et seq.*, permitting suit against a foreign state when "the action is based upon a commercial activity carried on in the United States by the foreign state," 28 U.S.C. 1605(a)(2). The plaintiffs were a husband and wife who sued Saudi Arabia and its state-owned hospital for torts against the husband, allegedly in retaliation for his reporting hazards at the hospital where he had worked (in Saudi Arabia) after being recruited and hired (in the United States) by the defendants. 507 U.S. at 352-354. Giving "based upon" its "natural meaning," the Court explained that the "based upon" provision reached only the "conduct that forms the 'basis,' or 'foundation,' for a

claim" or "the 'gravamen of the complaint'"—that is, "those elements of a claim that, if proven, would entitle a plaintiff to relief under his theory of the case." *Id.* at 357 (citations omitted). It was therefore insufficient that recruiting and hiring activities in the United States were "connect[ed] with" or "led to the conduct that eventually injured [the plaintiffs]." *Id.* at 358. Instead, the Court held that the plaintiffs' suit was "based upon" the tortious acts committed in Saudi Arabia. *Ibid.* The Court explained that the suit could not be "based upon" the defendants' earlier activities, despite their causal connection to the suit, because "those facts alone entitle the [plaintiffs] to nothing." *Ibid.*

In *OBB Personenverkehr AG* v. *Sachs*, 136 S. Ct. 390 (2015), the Court again made clear that a claim is only "based upon" the core or fundamental basis of the claim. *OBB Personenverkehr* concerned whether a plaintiff's tort and contract claims arising from a railway accident could be described as "based upon a commercial activity carried out in the United States," when the plaintiff bought her train ticket in the United States and was then injured boarding a train in Austria. *Id.* at 392-393 (citation omitted). This Court explained that *Nelson* "teaches that an action is 'based upon' the 'particular conduct' that constitutes the 'gravamen' of the suit." *Id.* at 396; see *ibid.* (indicating that a court must "zero[] in on the core of the[] suit"). Even though the ticket sale in the United States formed a part of the plaintiff's claims and bore a causal connection to the plaintiff's injuries, the Court concluded that the plaintiff's claims were not "based upon" that domestic conduct because "the conduct constituting the gravamen of [the plaintiff's] suit" consisted of the events in Austria that directly caused the plaintiff's injury. *Id.* at 396-397.

Dictionary definitions, *Nelson*, and *OBB Personenverkehr* all indicate that the term "based on" in Section 3582(c)(2) refers to a sentence's critical legal components, not other factors that might fall somewhere along the causal chain leading to the sentence's imposition. That construction additionally aligns with the construction of "based on" that lower courts have adopted in the highly analogous context of district courts' authority to reopen civil judgments. Under Federal Rule of Civil Procedure 60(b)(5), a district court may provide relief from a final judgment when that judgment "is based on an earlier judgment that has been reversed or vacated." Courts have consistently emphasized the narrow nature of that authorization, concluding that it "is limited to cases in which the present judgment is based on the prior judgment in the sense of claim or issue preclusion. It does not apply merely because a case relied on as precedent * * * has since been reversed." 11 Charles Alan Wright et al., *Federal Practice and Procedure* § 2863, at 451-453 (3d ed. 2012) (footnote omitted) (citing cases); see also, *e.g.*, *Manzanares* v. *City of Albuquerque*, 628 F.3d 1237, 1240 (10th Cir. 2010).

2. The foundation of the sentence of a defendant who pleads guilty under Rule 11(c)(1)(C) is the plea agreement, not a Guidelines range

As five Members of this Court concluded in *Freeman*, when a defendant pleads guilty in exchange for a specific sentence pursuant to Rule 11(e)(1)(C), "it is the binding plea agreement that is the foundation for the term of imprisonment to which the defendant is sentenced." *Freeman*, 564 U.S. at 535 (Sotomayor, J., concurring in the judgment); see *id.* at 544 (Roberts, C.J., dissenting). Accordingly, the defendant's sentence is

"based on" the plea agreement, rather than any Guidelines calculations.

a. Under Rule 11(c)(1)(C), a defendant and the government may agree in a plea agreement "that a specific sentence or sentencing range is the appropriate disposition of the case," and "such a recommendation or request binds the court once the court accepts the plea agreement." Fed. R. Crim. P. 11(c)(1)(C). Rule 11(c)(4) further provides that "[i]f the court accepts the plea agreement, * * * the agreed disposition will be included in the judgment." Fed. R. Crim. P. 11(c)(4).

The district court thus has no authority to modify the parties' sentencing bargain once it accepts that kind of plea agreement. See Fed. R. Crim. P. 11(c)(1)(C), (3)(A), and (4). Unlike, for example, plea agreements under Rule 11(c)(1)(B), in which the government agrees to make a non-binding sentence recommendation or agrees not to oppose a defendant's sentencing request, the parties' stipulation to a sentence in a type C agreement is so critical that a defendant may withdraw the guilty plea if the court does not accept the parties' sentencing stipulation. See Fed. R. Crim. P. 11(c)(5)(B); see also Fed. R. Crim. P. 11 advisory committee's note (1979 Amendment) ("critical to a type * * * (C) agreement is that the defendant receive the * * * agreed-to sentence").

Accordingly, where the parties agree on a sentence in a Rule 11(c)(1)(C) plea agreement and the court accepts their agreement, the resulting sentence is "based on" the agreement, not on any other considerations. The terms of the agreement are the foundation of the sentence and the superseding factor entitling the defendant to the sentence he receives, even though other

factors doubtless influenced the parties' decisions to enter the agreement and the district court's decision to accept it. See *Freeman*, 564 U.S. at 536 (Sotomayor, J., concurring in the judgment) ("The term of imprisonment imposed by the sentencing judge is dictated by the terms of the agreement entered into by the parties, not the judge's Guidelines calculation."); *id.* at 544 (Roberts, C.J., dissenting) (similar).

b. The context in which Section 3582(c)(2) was adopted reinforces that conclusion. By the time Congress enacted the SRA in 1984, Rule 11(c)(1)(C) pleas were well-established as a mechanism "to bind the district court and allow the Government and the defendant to determine what sentence he will receive." *Freeman*, 564 U.S. at 536 (Sotomayor, J., concurring in the judgment); see *id.* at 537 (noting that at the time of the SRA's enactment, it was "well understood that, under Rule 11, the term of imprisonment stipulated in a (C) agreement bound the district court once it accepted the agreement"); see also, *e.g.*, *United States* v. *French*, 719 F.2d 387, 389 & n.2 (11th Cir. 1983) (per curiam), cert. denied, 466 U.S. 960 (1984); *United States* v. *Thompson*, 680 F.2d 1145, 1150 (7th Cir.), cert. denied, 459 U.S. 1089 (1982), and 459 U.S. 1108 (1983); *United States* v. *Stevens*, 548 F.2d 1360, 1362 (9th Cir.), cert. denied, 430 U.S. 975 (1977).

Had Congress wished to authorize district courts to retroactively revise sentences of Rule 11(c)(1)(C) defendants against this backdrop, it could easily have done so. For example, it could have made Section 3582(c)(2) applicable to any "defendant whose underlying sentencing range was subsequently lowered by the Sentencing Commission, whether or not that range was applied at sentencing." But Congress instead limited

sentence reductions to sentences "based on" a sentencing range that is later amended. That choice is significant because Congress would have been aware that after a district court accepted a Rule 11(c)(1)(C) agreement, it was bound to sentence the defendant in accordance with the terms of the agreement, irrespective of the defendant's Guidelines range. See *Bowen* v. *Massachusetts*, 487 U.S. 879, 896 (1988) (noting "well-settled presumption that Congress understands the state of existing law when it legislates").

Petitioner is mistaken in arguing (Br. 29) that the absence of an explicit reference to Rule 11(c)(1)(C) defendants in the text of Section 3582 indicates that district courts may revise such defendants' sentences. Congress did place such defendants outside Section 3582(c)(2) through the language it enacted—by authorizing sentence reductions for only defendants whose terms of imprisonment were "based on a sentencing range that has subsequently been lowered by the Sentencing Commission," 18 U.S.C. 3582(c)(2). That language does not, naturally read, reach defendants whose sentences were imposed based on binding Rule 11(c)(1)(C) agreements. And the natural reading of the statutory language is particularly sensible in light of the history of Rule 11(c)(1)(C) agreements as setting binding sentences that district courts lacked the authority to alter. It is unlikely that Congress intended Section 3582(c)(2) "to fundamentally alter the way in which Rule 11(c)(1)(C) operates" without "any indication from the statutory text or legislative history" signaling that intent. *Freeman*, 564 U.S. at 537 (Sotomayor, J., concurring in the judgment).[3]

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[3] Petitioner contends (Br. 23) that the conclusion that sentences under Rule 11(c)(1)(C) are never "based on" the Guidelines is "at

c. Petitioner proposes (Br. 13-20) that Section 3582(c)(2)'s language allowing reduction of a sentence "based on" a subsequently amended Sentencing Guideline is best understood to call for application of common-law proximate-cause principles from the tort context. See Pet. Br. 16 (citing W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 43, 300 (5th ed. 1984) and Restatement (Second) of the Law of Torts § 431 (1965)). But this Court's decisions construing the term "based upon" in federal statutes creating causes of action, see pp. 40-42, *supra*, provide by far the most apposite guide to the federal statutory language here. Petitioner does not address those cases' guidance that a claim is "based upon" only its "core" or "foundation"—*i.e.*, its determinative legal components—and not on other, less central, factors.

In any event, the application of tort-law proximate-cause principles would confirm the determination of five Justices in *Freeman* that the sentence of a Rule

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odds with" a provision of the SRA that permits defendants to appeal any sentence "imposed as a result of an incorrect application of the sentencing guidelines," 18 U.S.C. 3742(a)(2). That provision, however, does not employ the term "based on." And even if Section 3582(c)(2) and Section 3742(a)(2) have identical scope, nothing in Section 3742(a)(2) indicates that a defendant who enters a binding agreement for a specified sentence under Rule 11(c)(1)(C) can appeal under Section 3742(a)(2). Petitioner cites only one circuit case that has permitted such an appeal, see Pet. Br. 23 (citing *United States* v. *Smith*, 918 F.2d 664, 668-669 (6th Cir. 1990) (per curiam), cert. denied, 498 U.S. 1125 (1991)), and the result it reached is inconsistent with Congress's intent in enacting the SRA that "a sentence consistent with a plea agreement cannot be appealed," 1983 Senate Report 153. Congress could, and evidently did, view sentences imposed pursuant to Rule 11(c)(1)(C) plea agreements not to "result" from an "application of the sentencing guidelines," 18 U.S.C. 3742(a)(2).

11(c)(1)(C) defendant is "based on" the terms of the binding plea agreement and not on Guidelines calculations. As this Court has repeatedly held, tort-law proximate cause requires a "*direct* relation between the injury asserted and the injurious conduct alleged," *Bank of Am. Corp.* v. *City of Miami*, 137 S. Ct. 1296, 1306 (2017) (emphasis added; citation omitted), and "the general tendency" is "not to stretch proximate causation beyond the first step," *Lexmark Int'l, Inc.* v. *Static Control Components, Inc.*, 134 S. Ct. 1377, 1394 (2014) (citation and internal quotation marks omitted); see *Bank of Am.*, 137 S. Ct. at 1306 (same); *Hemi Grp., LLC* v. *City of New York*, 559 U.S. 1, 10 (2010) (same). The direct cause of the sentence of a Rule 11(c)(1)(C) defendant is the binding plea agreement. Background Guidelines calculations, in contrast, are one of many possible indirect influences on the agreement that the parties reach and the district court accepts.[4]

d. Although five Members of this Court agreed in *Freeman* that the sentence of a defendant who enters a binding plea under Rule 11(c)(1)(C) is based only upon

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[4] Petitioner's request for a loose proximate-cause standard would also create serious administrability problems. In petitioner's view (Br. 23) the Sentencing Guidelines would "often" but "not always" bear a sufficiently close connection to a sentence to allow a sentence reduction under Section 3582(c)(2). For example, the Guidelines would be a proximate cause if a court "used the Guidelines range to justify" the sentence, including as "the beginning point to explain the decision to deviate" from the Sentencing Guidelines. Pet. Br. 26 (citation and internal quotation marks omitted). But the Sentencing Guidelines would not be a proximate cause if the district court "merely consults" the Sentencing Guidelines. *Id.* at 27. That highly indeterminate inquiry into the weight that the Sentencing Guidelines received at particular sentencings would be unlikely to yield consistent and predictable results.

the defendant's binding plea agreement, Justice Sotomayor concluded that defendants who enter such pleas may be eligible for resentencing under Section 3582(c)(2) in limited circumstances. 564 U.S. at 539-542. Justice Sotomayor initially observed that when a Rule 11(c)(1)(C) agreement "call[s] for the defendant to be sentenced within a particular Guidelines sentencing range," the defendant's sentence will be based on the Guidelines because the district court must apply the Guidelines in sentencing such a defendant. *Id.* at 538. Justice Sotomayor then further wrote that a Rule 11(c)(1)(C) defendant could also establish that his sentence was "based on" the Guidelines in cases in which an agreement "provide[s] for a specific term of imprisonment * * * but also make[s] clear that the basis for the specified term is a Guidelines sentencing range applicable to the offense to which the defendant pleaded guilty." *Id.* at 539.

That latter extension is unwarranted, because the district court's sentence in a Rule 11(c)(1)(C) case is "based on" only the terms in the plea agreement. See pp. 39-45, *supra*; *Freeman*, 564 U.S. at 535 (Sotomayor, J., concurring in the judgment); *id.* at 544 (Roberts, C.J., dissenting). So long as the agreement calls on the district court to impose a specified sentence—rather than to apply a provision of the Sentencing Guidelines—prefatory considerations that may have influenced the parties in selecting the agreement's terms are legally irrelevant. See *id.* at 547 (Roberts, C.J., dissenting) ("Only a court can sentence a defendant, so there is no basis for examining why the parties settled on a particular prison term."); see also, *e.g.*, Restatement (Second) of the Law of Contracts § 214 (1981) (limiting circumstances under which court may consider "[a]greements

and negotiations prior to or contemporaneous with the adoption of a writing"). The district court's implementation of the plea agreement is not a function of how the parties arrived at that agreement; it is a function of the agreement itself.

C. The Sentencing Commission's Limitations Confirm That Defendants Sentenced Under Rule 11(c)(1)(C) Plea Agreements Are Ineligible For Section 3582(c)(2) Reductions

The Sentencing Commission's implementation of its authority under Section 3582(c)(2) to constrain the availability of sentence reductions likewise precludes reductions for defendants who receive specific sentences under Rule 11(c)(1)(C) plea agreements.

Section 3582(c)(2) requires any sentence reduction to be "consistent with applicable policy statements issued by the Sentencing Commission," which are binding on the district court. 18 U.S.C. 3582(c)(2); see *Dillon*, 560 U.S. at 827. Under the Commission's instructions in Sentencing Guidelines § 1B1.10, a court considering a sentence reduction is permitted to "substitute only" those retroactively amended provisions that "correspond[]" to the "guideline provisions that were *applied when the defendant was sentenced*" and must "leave all other guideline application decisions unaffected." *Ibid.* (quoting *id.* § 1B1.10(b)(1)) (emphasis added). The Commission has thereby made sentence reductions available only insofar as it has amended Guidelines that actually "were applied when the defendant was sentenced." *Id.* § 1B1.10(b)(1).

The act of imposing a specific sentence pursuant to a type C plea agreement involves no "appli[cation]" of the Guidelines at the time of sentencing. Sentencing Guidelines § 1B1.10(b)(1). By the time the sentencing occurs

(*i.e.*, the time that is relevant under Section 1B1.10(b)(1)), the district court has already accepted the plea agreement. The court does not "appl[y]" the Sentencing Guidelines at that point but instead imposes the specific sentence to which the parties agreed. *Ibid.* Although petitioner discusses whether his sentence was "based on" the Sentencing Guidelines, he does not (and could not plausibly) argue that the Guidelines were actually "applied when [he] was sentenced." *Ibid.*[5]

D. Using Section 3582(c)(2) To Reduce A Sentence That Was Required Under Rule 11(c)(1)(C) Inappropriately Vitiates The Terms Of The Parties' Agreement

Petitioner's construction of Section 3582(c)(2) would give defendants an unjustified windfall by allowing them to retain all the benefits of their plea agreements (here, the dismissal of counts and an agreement that the government would not file an information triggering a mandatory life sentence) while depriving the government of a principal benefit of its Rule 11(c)(1)(C) bargains (the guarantee of a particular sentence or sentencing range).

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[5] The interpretation of Section 3582(c)(2) adopted by five Justices in *Freeman* is also consistent with Sentencing Guidelines § 6B1.2, which sets out standards for the acceptance of Rule 11(c)(1)(C) plea agreements. See *Freeman*, 564 U.S. at 529 (opinion of Kennedy, J.) (discussing Sentencing Guidelines § 6B1.2 (2011)). That section requires courts to determine whether an agreed-upon sentence is outside a defendant's Sentencing Guidelines range and to state the reasons for a non-Guidelines sentence. Sentencing Guidelines § 6B1.2. But it does not require that Rule 11(c)(1)(C) sentences adhere to the Sentencing Guidelines or transform the imposition of the binding sentence in the plea agreement into an application of the Sentencing Guidelines themselves. *Ibid.* (stating that a binding plea agreement for an out-of-Guidelines sentence may be accepted for any "justifiable reasons").

1. Plea agreements are essential to the administration of criminal justice

This Court recognized long ago that "[t]he disposition of criminal charges by agreement between the prosecutor and the accused, sometimes loosely called 'plea bargaining,' is an essential component of the administration of justice." *Santobello* v. *New York*, 404 U.S. 257, 260 (1971); see also *Missouri* v. *Frye*, 566 U.S. 134, 143 (2012); Fed. R. Crim. P. 11 advisory committee's note (1974 Amendment).

Plea bargaining "flows from the 'mutuality of advantage' to defendants and prosecutors, each with his own reasons for wanting to avoid trial." *Bordenkircher* v. *Hayes*, 434 U.S. 357, 363 (1978) (quoting *Brady* v. *United States*, 397 U.S. 742, 752 (1970)). For example, "a great many" defendants are "motivated at least in part by the hope or assurance of a lesser penalty than might be imposed if there were a guilty verdict after trial to judge or jury," while the government may obtain a "more promptly imposed punishment" and preserve prosecutorial resources by avoiding trial. *Brady*, 397 U.S. at 752; see *Frye*, 566 U.S. at 144.

Consistent with the contractual nature of plea agreements, the parties to such agreements are generally held to the bargains struck through their negotiations. See, *e.g.*, *United States* v. *Hyde*, 520 U.S. 670, 671 (1997) (holding that a defendant was not entitled to withdraw a guilty plea before the agreement was accepted by court, absent a "fair and just reason," under language now located at Fed. R. Crim. P. 11(d)(2)(B)); *Santobello*, 404 U.S. at 262 (holding that "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be part of the inducement or consideration, such promise must be fulfilled"); *Brady*,

397 U.S. at 757. Thus, a plea agreement remains binding even after a favorable change in the law that would have benefitted the defendant, because the "possibility" of such a change "occurring after a plea is one of the normal risks that accompany a guilty plea." *United States* v. *Sahlin*, 399 F.3d 27, 31 (1st Cir. 2005); accord *United States* v. *Robinson*, 587 F.3d 1122, 1129 (D.C. Cir. 2009); *United States* v. *Silva*, 413 F.3d 1283, 1284 (10th Cir. 2005); *United States* v. *Bownes*, 405 F.3d 634, 636-638 (7th Cir.), cert. denied, 546 U.S. 926 (2005).

2. The government's construction of Section 3582(c)(2) preserves the parties' bargain

In addition to being inconsistent with the nature of a type C agreement, permitting a defendant who pleaded guilty in exchange for a specific sentence to obtain a Section 3582(c)(2) sentence reduction would result in unjustified benefits to the defendant, at the government's expense.

a. In exchange for obtaining the certainty of a specific sentence under Rule 11(c)(1)(C), the government often makes substantial concessions. The government may be willing to accept a lower, compromise sentence than the one it would seek under a non-binding Rule 11(c)(1)(B) agreement. It may also agree to dismiss charges, as it did here. And it may agree not to file recidivist enhancements, like the one available in this case, which would have triggered a mandatory life sentence.

The parties' contractual bargain, which is binding on the court after it accepts a Rule 11(c)(1)(C) agreement, would be negated if Section 3582(c)(2) were construed to grant the court discretion to lower an agreed-upon sentence in light of a later amendment to the Sentencing Guidelines. In seeking a sentence reduction under

that provision, a defendant is not attempting to withdraw his guilty plea and place the parties back in their original positions. Instead, he is seeking to retain the benefits he received under the agreement, while at the same time obtaining a lower sentence than the one to which he and the government agreed. But by entering a type C plea agreement, petitioner bargained away the possibility of a lower sentence in exchange for concessions from the government and certainty about the sentence he would receive. In such circumstances, permitting the sentencing court to exercise discretion under Section 3582(c)(2) to reduce petitioner's sentence would result in an unjustified windfall to him.

b. Petitioner argues (Br. 30-31) that holding Rule 11(c)(1)(C) defendants to their bargains "arbitrarily distinguish[es] between similarly situated defendants"—those who entered in to Rule 11(c)(1)(C) agreements and those who did not. But those two groups of defendants are not similarly situated, because, as noted above, a defendant who agrees to a specific sentence under Rule 11(c)(1)(C) gets benefits that other defendants do not. No arbitrariness results from requiring defendants who received benefits during the plea bargaining process to be bound by the concessions that they made in return. See *Pepper* v. *United States*, 562 U.S. 476, 502-503 (2011) (concluding that "disparities resulting from the normal trial and sentencing process" are not the "unwarranted sentencing disparities" among similar defendants that are to be avoided under the SRA).

c. Petitioner also argues (Br. 31-32) that holding Rule 11(c)(1)(C) defendants to their bargains creates unjustified disparities among Rule 11(c)(1)(C) defendants. But such disparities would be created by petitioner's approach, not the government's.

Petitioner would allow a defendant who bargained for a fixed sentence to seek a reduction based on a change to the Sentencing Guidelines even when no evidence indicates that the government would have entered a deal for a lower sentence had the defendant been sentenced after the Guidelines change had occurred. Thus, simply by virtue of an earlier sentencing date, some Rule 11(c)(1)(C) defendants will receive a benefit over later-sentenced defendants.

This case illustrates that point. The parties settled on a 180-month sentence, which falls halfway between the statutory minimum if the government did not file any prior felony information and the minimum if the government filed an information noting only one of petitioner's prior drug felonies. See 21 U.S.C. 841(b)(1)(A). The parties' agreement did not tether the 180-month sentence to any Guidelines calculation, or even make such a calculation. And the 180-month sentence fell outside of the Guidelines range. There is thus no indication that the government would have offered petitioner a more favorable bargain had Amendment 782 been in effect.

There is likewise no indication that the district court would have refused to accept the plea agreement if the parties had reached their bargain after Amendment 782 was enacted. While the court indicated that the advisory Sentencing Guidelines were one factor among the many that it considered in deciding whether to approve the agreement, Pet. App. 44a, 47a-48a, it made precise determinations of petitioner's criminal history category, offense level, and advisory Guidelines range only after it had accepted the plea agreement and bound itself to impose the stipulated sentence, *id.* at 32a-36a. And the other considerations bearing on petitioner's

sentence make it highly unlikely that the court would have disapproved the bargain had the already-proposed Amendment 782 been in effect. As the district court was aware, the government agreed as part of the deal to forgo filing an information concerning multiple prior drug felonies that would have raised petitioner's statutory minimum sentence from ten years to life. By giving some Rule 11(c)(1)(C) defendants the opportunity to obtain reduced sentences to which there is no evidence the government would have agreed, petitioner would create unwarranted disparities with later-sentenced defendants who have no similar opportunity to improve their bargains.

Petitioner suggests (Br. 30-31) that his approach avoids unwarranted disparities between earlier- and later-sentenced Rule 11(c)(1)(C) defendants when the earlier-sentenced defendant might have been offered a better deal had a later amendment been in effect. But an earlier-sentenced defendant's inability to benefit from a later change in the law is not an unjustified disparity, because defendants who plead guilty generally assume the risk that later changes in the law would have benefited them. See, *e.g.*, *Brady*, 397 U.S. at 757 (recognizing that generally "a voluntary plea of guilty intelligently made in light of the then applicable law does not become vulnerable because later judicial decisions indicate that the plea rested on a faulty premise"). They forgo the possibility of benefiting from future developments in return for increased certainty and the bargained-for benefits of a plea. See, *e.g.*, *United States* v. *Porter*, 405 F.3d 1136, 1145 (10th Cir.) (noting that in a plea deal, "each side foregoes certain rights and assumes certain risks in exchange for a degree of cer-

tainty as to the outcome," and "[o]ne such risk is a favorable change in the law"), cert. denied, 546 U.S. 980 (2005). Construing Section 3582(c)(2) to preclude sentence reductions for defendants who plead guilty in exchange for a specific sentence appropriately preserves the parties' bargain and works no injustice.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. 18 U.S.C. 3582 provides:

Imposition of a sentence of imprisonment

(a) FACTORS TO BE CONSIDERED IN IMPOSING A TERM OF IMPRISONMENT.—The court, in determining whether to impose a term of imprisonment, and, if a term of imprisonment is to be imposed, in determining the length of the term, shall consider the factors set forth in section 3553(a) to the extent that they are applicable, recognizing that imprisonment is not an appropriate means of promoting correction and rehabilitation. In determining whether to make a recommendation concerning the type of prison facility appropriate for the defendant, the court shall consider any pertinent policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2).

(b) EFFECT OF FINALITY OF JUDGMENT.—Notwithstanding the fact that a sentence to imprisonment can subsequently be—

(1) modified pursuant to the provisions of subsection (c);

(2) corrected pursuant to the provisions of rule 35 of the Federal Rules of Criminal Procedure and section 3742; or

(3) appealed and modified, if outside the guideline range, pursuant to the provisions of section 3742;

a judgment of conviction that includes such a sentence constitutes a final judgment for all other purposes.

(c) MODIFICATION OF AN IMPOSED TERM OF IMPRISONMENT.—The court may not modify a term of imprisonment once it has been imposed except that—

(1) in any case—

(A) the court, upon motion of the Director of the Bureau of Prisons, may reduce the term of imprisonment (and may impose a term of probation or supervised release with or without conditions that does not exceed the unserved portion of the original term of imprisonment), after considering the factors set forth in section 3553(a) to the extent that they are applicable, if it finds that—

(i) extraordinary and compelling reasons warrant such a reduction; or

(ii) the defendant is at least 70 years of age, has served at least 30 years in prison, pursuant to a sentence imposed under section 3559(c), for the offense or offenses for which the defendant is currently imprisoned, and a determination has been made by the Director of the Bureau of Prisons that the defendant is not a danger to the safety of any other person or the community, as provided under section 3142(g);

and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission; and

(B) the court may modify an imposed term of imprisonment to the extent otherwise ex-

pressly permitted by statute or by Rule 35 of the Federal Rules of Criminal Procedure; and

(2) in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. 994(*o*), upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion, the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.

(d) INCLUSION OF AN ORDER TO LIMIT CRIMINAL ASSOCIATION OF ORGANIZED CRIME AND DRUG OFFENDERS.—The court, in imposing a sentence to a term of imprisonment upon a defendant convicted of a felony set forth in chapter 95 (racketeering) or 96 (racketeer influenced and corrupt organizations) of this title or in the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 801 et seq.), or at any time thereafter upon motion by the Director of the Bureau of Prisons or a United States attorney, may include as a part of the sentence an order that requires that the defendant not associate or communicate with a specified person, other than his attorney, upon a showing of probable cause to believe that association or communication with such person is for the purpose of enabling the defendant to control, manage, direct, finance, or otherwise participate in an illegal enterprise.

2. 18 U.S.C. 3742 provides:

Review of a sentence

(a) APPEAL BY A DEFENDANT.—A defendant may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence—

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines; or

(3) is greater than the sentence specified in the applicable guideline range to the extent that the sentence includes a greater fine or term of imprisonment, probation, or supervised release than the maximum established in the guideline range, or includes a more limiting condition of probation or supervised release under section 3563(b)(6) or (b)(11)[1] than the maximum established in the guideline range; or

(4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.

(b) APPEAL BY THE GOVERNMENT.—The Government may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence—

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines;

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[1] See References in Text note below.

(3) is less than the sentence specified in the applicable guideline range to the extent that the sentence includes a lesser fine or term of imprisonment, probation, or supervised release than the minimum established in the guideline range, or includes a less limiting condition of probation or supervised release under section 3563(b)(6) or (b)(11)[1] than the minimum established in the guideline range; or

(4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.

The Government may not further prosecute such appeal without the personal approval of the Attorney General, the Solicitor General, or a deputy solicitor general designated by the Solicitor General.

(c) PLEA AGREEMENTS.—In the case of a plea agreement that includes a specific sentence under rule 11(e)(1)(C) of the Federal Rules of Criminal Procedure—

(1) a defendant may not file a notice of appeal under paragraph (3) or (4) of subsection (a) unless the sentence imposed is greater than the sentence set forth in such agreement; and

(2) the Government may not file a notice of appeal under paragraph (3) or (4) of subsection (b) unless the sentence imposed is less than the sentence set forth in such agreement.

(d) RECORD ON REVIEW.—If a notice of appeal is filed in the district court pursuant to subsection (a) or (b), the clerk shall certify to the court of appeals—

(1) that portion of the record in the case that is designated as pertinent by either of the parties;

(2) the presentence report; and

(3) the information submitted during the sentencing proceeding.

(e) CONSIDERATION.—Upon review of the record, the court of appeals shall determine whether the sentence—

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines;

(3) is outside the applicable guideline range, and

(A) the district court failed to provide the written statement of reasons required by section 3553(c);

(B) the sentence departs from the applicable guideline range based on a factor that—

(i) does not advance the objectives set forth in section 3553(a)(2); or

(ii) is not authorized under section 3553(b); or

(iii) is not justified by the facts of the case; or

(C) the sentence departs to an unreasonable degree from the applicable guidelines range, having regard for the factors to be considered in imposing a sentence, as set forth in section 3553(a) of this title and the reasons for the imposition of the particular sentence, as stated by the district

court pursuant to the provisions of section 3553(c); or

(4) was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable.

The court of appeals shall give due regard to the opportunity of the district court to judge the credibility of the witnesses, and shall accept the findings of fact of the district court unless they are clearly erroneous and, except with respect to determinations under subsection (3)(A) or (3)(B), shall give due deference to the district court's application of the guidelines to the facts. With respect to determinations under subsection (3)(A) or (3)(B), the court of appeals shall review de novo the district court's application of the guidelines to the facts.

(f) DECISION AND DISPOSITION.—If the court of appeals determines that—

(1) the sentence was imposed in violation of law or imposed as a result of an incorrect application of the sentencing guidelines, the court shall remand the case for further sentencing proceedings with such instructions as the court considers appropriate;

(2) the sentence is outside the applicable guideline range and the district court failed to provide the required statement of reasons in the order of judgment and commitment, or the departure is based on an impermissible factor, or is to an unreasonable degree, or the sentence was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable, it shall state specific reasons for its conclusions and—

(A) if it determines that the sentence is too high and the appeal has been filed under subsection (a), it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate, subject to subsection (g);

(B) if it determines that the sentence is too low and the appeal has been filed under subsection (b), it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate, subject to subsection (g);

(3) the sentence is not described in paragraph (1) or (2), it shall affirm the sentence.

(g) SENTENCING UPON REMAND.—A district court to which a case is remanded pursuant to subsection (f)(1) or (f)(2) shall resentence a defendant in accordance with section 3553 and with such instructions as may have been given by the court of appeals, except that—

(1) In determining the range referred to in subsection 3553(a)(4), the court shall apply the guidelines issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, and that were in effect on the date of the previous sentencing of the defendant prior to the appeal, together with any amendments thereto by any act of Congress that was in effect on such date; and

(2) The court shall not impose a sentence outside the applicable guidelines range except upon a ground that—

(A) was specifically and affirmatively included in the written statement of reasons required by section 3553(c) in connection with the previous sentencing of the defendant prior to the appeal; and

(B) was held by the court of appeals, in remanding the case, to be a permissible ground of departure.

(h) APPLICATION TO A SENTENCE BY A MAGISTRATE JUDGE.—An appeal of an otherwise final sentence imposed by a United States magistrate judge may be taken to a judge of the district court, and this section shall apply (except for the requirement of approval by the Attorney General or the Solicitor General in the case of a Government appeal) as though the appeal were to a court of appeals from a sentence imposed by a district court.

(i) GUIDELINE NOT EXPRESSED AS A RANGE.—For the purpose of this section, the term "guideline range" includes a guideline range having the same upper and lower limits.

(j) DEFINITIONS.—For purposes of this section—

(1) a factor is a "permissible" ground of departure if it—

(A) advances the objectives set forth in section 3553(a)(2); and

(B) is authorized under section 3553(b); and

(C) is justified by the facts of the case; and

(2) a factor is an "impermissible" ground of departure if it is not a permissible factor within the meaning of subsection (j)(1).

3. Fed. R. Crim. P. 11 provides in pertinent part:

Pleas

* * * * *

(c) Plea Agreement Procedure.

(1) In General. An attorney for the government and the defendant's attorney, or the defendant when proceeding pro se, may discuss and reach a plea agreement. The court must not participate in these discussions. If the defendant pleads guilty or nolo contendere to either a charged offense or a lesser or related offense, the plea agreement may specify that an attorney for the government will:

(A) not bring, or will move to dismiss, other charges;

(B) recommend, or agree not to oppose the defendant's request, that a particular sentence or sentencing range is appropriate or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply (such a recommendation or request does not bind the court); or

(C) agree that a specific sentence or sentencing range is the appropriate disposition of the case, or that a particular provision of the Sen-

tencing Guidelines, or policy statement, or sentencing factor does or does not apply (such a recommendation or request binds the court once the court accepts the plea agreement).

(2) Disclosing a Plea Agreement. The parties must disclose the plea agreement in open court when the plea is offered, unless the court for good cause allows the parties to disclose the plea agreement in camera.

(3) Judicial Consideration of a Plea Agreement.

(A) To the extent the plea agreement is of the type specified in Rule 11(c)(1)(A) or (C), the court may accept the agreement, reject it, or defer a decision until the court has reviewed the presentence report.

(B) To the extent the plea agreement is of the type specified in Rule 11(c)(1)(B), the court must advise the defendant that the defendant has no right to withdraw the plea if the court does not follow the recommendation or request.

(4) Accepting a Plea Agreement. If the court accepts the plea agreement, it must inform the defendant that to the extent the plea agreement is of the type specified in Rule 11(c)(1)(A) or (C), the agreed disposition will be included in the judgment.

(5) Rejecting a Plea Agreement. If the court rejects a plea agreement containing provisions of the type specified in Rule 11(c)(1)(A) or (C), the court must do the following on the record and in open court (or, for good cause, in camera):

(A) inform the parties that the court rejects the plea agreement;

(B) advise the defendant personally that the court is not required to follow the plea agreement and give the defendant an opportunity to withdraw the plea; and

(C) advise the defendant personally that if the plea is not withdrawn, the court may dispose of the case less favorably toward the defendant than the plea agreement contemplated.

(d) Withdrawing a Guilty or Nolo Contendere Plea. A defendant may withdraw a plea of guilty or nolo contendere:

(1) before the court accepts the plea, for any reason or no reason; or

(2) after the court accepts the plea, but before it imposes sentence if:

(A) the court rejects a plea agreement under 11(c)(5); or

(B) the defendant can show a fair and just reason for requesting the withdrawal.

* * * * *

4. United States Sentencing Guidelines § 1B1.10 (2014) provides:

Reduction in Term of Imprisonment as a Result of Amended Guideline Range (Policy Statement)

(a) Authority.—

(1) In General.—In a case in which a defendant is serving a term of imprisonment, and the guideline range applicable to that defendant has subsequently been lowered as a result of an amendment to the Guidelines Manual listed in subsection (d) below, the court may reduce the defendant's term of imprisonment as provided by 18 U.S.C. § 3582(c)(2). As required by 18 U.S.C. § 3582(c)(2), any such reduction in the defendant's term of imprisonment shall be consistent with this policy statement.

(2) Exclusions.—A reduction in the defendant's term of imprisonment is not consistent with this policy statement and therefore is not authorized under 18 U.S.C. § 3582(c)(2) if—

(A) none of the amendments listed in subsection (d) is applicable to the defendant; or

(B) an amendment listed in subsection (d) does not have the effect of lowering the defendant's applicable guideline range.

(3) Limitation.—Consistent with subsection (b), proceedings under 18 U.S.C. § 3582(c)(2) and this policy statement do not constitute a full resentencing of the defendant.

(b) Determination of Reduction in Term of Imprisonment.—

(1) In General.—In determining whether, and to what extent, a reduction in the defendant's term of imprisonment under 18 U.S.C. § 3582(c)(2) and this policy statement is warranted, the court shall determine the amended guideline range that would have been applicable to the defendant if the amendment(s) to the guidelines listed in subsection (d) had been in effect at the time the defendant was sentenced. In making such determination, the court shall substitute only the amendments listed in subsection (d) for the corresponding guideline provisions that were applied when the defendant was sentenced and shall leave all other guideline application decisions unaffected.

(2) Limitation and Prohibition on Extent of Reduction.—

(A) Limitation.—Except as provided in subdivision (B), the court shall not reduce the defendant's term of imprisonment under 18 U.S.C. § 3582(c)(2) and this policy statement to a term that is less than the minimum of the

amended guideline range determined under subdivision (1) of this subsection.

(B) Exception for Substantial Assistance.—If the term of imprisonment imposed was less than the term of imprisonment provided by the guideline range applicable to the defendant at the time of sentencing pursuant to a government motion to reflect the defendant's substantial assistance to authorities, a reduction comparably less than the amended guideline range determined under subdivision (1) of this subsection may be appropriate.

(C) Prohibition.—In no event may the reduced term of imprisonment be less than the term of imprisonment the defendant has already served.

(c) Cases Involving Mandatory Minimum Sentences and Substantial Assistance.—If the case involves a statutorily required minimum sentence and the court had the authority to impose a sentence below the statutorily required minimum sentence pursuant to a government motion to reflect the defendant's substantial assistance to authorities, then for purposes of this policy statement the amended guideline range shall be determined without regard to the operation of § 5G1.1 (Sentencing on a Single

Count of Conviction) and § 5G1.2 (Sentencing on Multiple Counts of Conviction).

(d) Covered Amendments.—Amendments covered by this policy statement are listed in Appendix C as follows: 126, 130, 156, 176, 269, 329, 341, 371, 379, 380, 433, 454, 461, 484, 488, 490, 499, 505, 506, 516, 591, 599, 606, 657, 702, 706 as amended by 711, 715, 750 (parts A and C only), and 782 (subject to subsection (e)(1)).

(e) Special Instruction.—

(1) The court shall not order a reduced term of imprisonment based on Amendment 782 unless the effective date of the court's order is November 1, 2015, or later.

Commentary

Application Notes:

1. *Application of Subsection (a).—*

(A) Eligibility.—Eligibility for consideration under 18 U.S.C. § 3582(c)(2) is triggered only by an amendment listed in subsection (d) that lowers the applicable guideline range (i.e., the guideline range that corresponds to the offense level and criminal history category determined pursuant to § 1B1.1(a), which is determined before consideration of any departure provision in the Guidelines Manual or any variance). Accordingly, a reduction in the defendant's term of imprisonment is not authorized under 18 U.S.C. § 3582(c)(2) and is not consistent with this policy statement if: (i)

none of the amendments listed in subsection (d) is applicable to the defendant; or (ii) an amendment listed in subsection (d) is applicable to the defendant but the amendment does not have the effect of lowering the defendant's applicable guideline range because of the operation of another guideline or statutory provision (e.g., a statutory mandatory minimum term of imprisonment).

(B) Factors for Consideration.—

(i) In General.—Consistent with 18 U.S.C. § 3582(c)(2), the court shall consider the factors set forth in 18 U.S.C. § 3553(a) in determining: (I) whether a reduction in the defendant's term of imprisonment is warranted; and (II) the extent of such reduction, but only within the limits described in subsection (b).

(ii) Public Safety Consideration.—The court shall consider the nature and seriousness of the danger to any person or the community that may be posed by a reduction in the defendant's term of imprisonment in determining: (I) whether such a reduction is warranted; and (II) the extent of such reduction, but only within the limits described in subsection (b).

(iii) Post-Sentencing Conduct.—The court may consider post-sentencing conduct of the defendant that occurred after imposition of the term of imprisonment in determin-

ing: (I) whether a reduction in the defendant's term of imprisonment is warranted; and (II) the extent of such reduction, but only within the limits described in subsection (b).

2. *Application of Subsection (b)(1).—In determining the amended guideline range under subsection (b)(1), the court shall substitute only the amendments listed in subsection (d) for the corresponding guideline provisions that were applied when the defendant was sentenced. All other guideline application decisions remain unaffected.*

3. *Application of Subsection (b)(2).—Under subsection (b)(2), the amended guideline range determined under subsection (b)(1) and the term of imprisonment already served by the defendant limit the extent to which the court may reduce the defendant's term of imprisonment under 18 U.S.C. § 3582(c)(2) and this policy statement. Specifically, as provided in subsection (b)(2)(A), if the term of imprisonment imposed was within the guideline range applicable to the defendant at the time of sentencing, the court may reduce the defendant's term of imprisonment to a term that is no less than the minimum term of imprisonment provided by the amended guideline range determined under subsection (b)(1). For example, in a case in which: (A) the guideline range applicable to the defendant at the time of sentencing was 70 to 87 months; (B) the term of imprisonment imposed was 70 months; and (C) the amended guideline range determined under subsection (b)(1) is 51 to 63 months, the court*

may reduce the defendant's term of imprisonment, but shall not reduce it to a term less than 51 months.

If the term of imprisonment imposed was outside the guideline range applicable to the defendant at the time of sentencing, the limitation in subsection (b)(2)(A) also applies. Thus, if the term of imprisonment imposed in the example provided above was not a sentence of 70 months (within the guidelines range) but instead was a sentence of 56 months (constituting a downward departure or variance), the court likewise may reduce the defendant's term of imprisonment, but shall not reduce it to a term less than 51 months.

Subsection (b)(2)(B) provides an exception to this limitation, which applies if the term of imprisonment imposed was less than the term of imprisonment provided by the guideline range applicable to the defendant at the time of sentencing pursuant to a government motion to reflect the defendant's substantial assistance to authorities. In such a case, the court may reduce the defendant's term, but the reduction is not limited by subsection (b)(2)(A) to the minimum of the amended guideline range. Instead, as provided in subsection (b)(2)(B), the court may, if appropriate, provide a reduction comparably less than the amended guideline range. Thus, if the term of imprisonment imposed in the example provided above was 56 months pursuant to a government motion to reflect the defendant's substantial assistance to authorities (representing a downward departure of 20 percent below the min-

imum term of imprisonment provided by the guideline range applicable to the defendant at the time of sentencing), a reduction to a term of imprisonment of 41 months (representing a reduction of approximately 20 percent below the minimum term of imprisonment provided by the amended guideline range) would amount to a comparable reduction and may be appropriate.

The provisions authorizing such a government motion are § 5K1.1 (Substantial Assistance to Authorities) (authorizing, upon government motion, a downward departure based on the defendant's substantial assistance); 18 U.S.C. § 3553(e) (authorizing the court, upon government motion, to impose a sentence below a statutory minimum to reflect the defendant's substantial assistance); and Fed. R. Crim. P. 35(b) (authorizing the court, upon government motion, to reduce a sentence to reflect the defendant's substantial assistance).

In no case, however, shall the term of imprisonment be reduced below time served. See subsection (b)(2)(C). Subject to these limitations, the sentencing court has the discretion to determine whether, and to what extent, to reduce a term of imprisonment under this section.

4. *Application of Subsection (c).—As stated in subsection (c), if the case involves a statutorily required minimum sentence and the court had the authority to impose a sentence below the statutorily required minimum sentence pursuant to a government motion to reflect the defendant's substantial assistance to authorities, then for purposes of*

this policy statement the amended guideline range shall be determined without regard to the operation of § 5G1.1 (Sentencing on a Single Count of Conviction) and § 5G1.2 (Sentencing on Multiple Counts of Conviction). For example:

(A) Defendant A is subject to a mandatory minimum term of imprisonment of 120 months. The original guideline range at the time of sentencing was 135 to 168 months, which is entirely above the mandatory minimum, and the court imposed a sentence of 101 months pursuant to a government motion to reflect the defendant's substantial assistance to authorities. The court determines that the amended guideline range as calculated on the Sentencing Table is 108 to 135 months. Ordinarily, § 5G1.1 would operate to restrict the amended guideline range to 120 to 135 months, to reflect the mandatory minimum term of imprisonment. For purposes of this policy statement, however, the amended guideline range remains 108 to 135 months.

To the extent the court considers it appropriate to provide a reduction comparably less than the amended guideline range pursuant to subsection (b)(2)(B), Defendant A's original sentence of 101 months amounted to a reduction of approximately 25 percent below the minimum of the original guideline range of 135 months. Therefore, an amended sentence of 81 months (representing a reduction of approximately 25 percent below the minimum of the amended

guideline range of 108 months) would amount to a comparable reduction and may be appropriate.

(B) Defendant B is subject to a mandatory minimum term of imprisonment of 120 months. The original guideline range at the time of sentencing (as calculated on the Sentencing Table) was 108 to 135 months, which was restricted by operation of § 5G1.1 to a range of 120 to 135 months. See § 5G1.1(c)(2). The court imposed a sentence of 90 months pursuant to a government motion to reflect the defendant's substantial assistance to authorities. The court determines that the amended guideline range as calculated on the Sentencing Table is 87 to 108 months. Ordinarily, § 5G1.1 would operate to restrict the amended guideline range to precisely 120 months, to reflect the mandatory minimum term of imprisonment. See § 5G1.1(b). For purposes of this policy statement, however, the amended guideline range is considered to be 87 to 108 months (i.e., unrestricted by operation of § 5G1.1 and the statutory minimum of 120 months).

To the extent the court considers it appropriate to provide a reduction comparably less than the amended guideline range pursuant to subsection (b)(2)(B), Defendant B's original sentence of 90 months amounted to a reduction of approximately 25 percent below the original guideline range of 120 months. Therefore, an amended sentence of 65 months (representing a re-

duction of approximately 25 percent below the minimum of the amended guideline range of 87 months) would amount to a comparable reduction and may be appropriate.

5. *Application to Amendment 750 (Parts A and C Only).—As specified in subsection (d), the parts of Amendment 750 that are covered by this policy statement are Parts A and C only. Part A amended the Drug Quantity Table in § 2D1.1 for crack cocaine and made related revisions to the Drug Equivalency Tables in the Commentary to § 2D1.1 (see § 2D1.1, comment. (n.8)). Part C deleted the cross reference in § 2D2.1(b) under which an offender who possessed more than 5 grams of crack cocaine was sentenced under § 2D1.1.*

6. *Application to Amendment 782.—As specified in subsection (d) and (e)(1), Amendment 782 (generally revising the Drug Quantity Table and chemical quantity tables across drug and chemical types) is covered by this policy statement only in cases in which the order reducing the defendant's term of imprisonment has an effective date of November 1, 2015, or later.*

   A reduction based on retroactive application of Amendment 782 that does not comply with the requirement that the order take effect on November 1, 2015, or later is not consistent with this policy statement and therefore is not authorized under 18 U.S.C. § 3582(c)(2).

   Subsection (e)(1) does not preclude the court from conducting sentence reduction proceedings and en-

tering orders under 18 U.S.C. § 3582(c)(2) and this policy statement before November 1, 2015, provided that any order reducing the defendant's term of imprisonment has an effective date of November 1, 2015, or later.

7. *Supervised Release.*—

(A) *Exclusion Relating to Revocation.—Only a term of imprisonment imposed as part of the original sentence is authorized to be reduced under this section. This section does not authorize a reduction in the term of imprisonment imposed upon revocation of supervised release.*

(B) *Modification Relating to Early Termination.—If the prohibition in subsection (b)(2)(C) relating to time already served precludes a reduction in the term of imprisonment to the extent the court determines otherwise would have been appropriate as a result of the amended guideline range determined under subsection (b)(1), the court may consider any such reduction that it was unable to grant in connection with any motion for early termination of a term of supervised release under 18 U.S.C. § 3583(e)(1). However, the fact that a defendant may have served a longer term of imprisonment than the court determines would have been appropriate in view of the amended guideline range determined under subsection (b)(1) shall not, without more, provide a basis for early termination of supervised release. Rather, the court should take into account the to-*

tality of circumstances relevant to a decision to terminate supervised release, including the term of supervised release that would have been appropriate in connection with a sentence under the amended guideline range determined under subsection (b)(1).

8. *Use of Policy Statement in Effect on Date of Reduction.—Consistent with subsection (a) of § 1B1.11 (Use of Guidelines Manual in Effect on Date of Sentencing), the court shall use the version of this policy statement that is in effect on the date on which the court reduces the defendant's term of imprisonment as provided by 18 U.S.C. § 3582(c)(2).*

Background: Section 3582(c)(2) of Title 18, United States Code, provides: "[I]n the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. § 994(o), upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion, the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission."

This policy statement provides guidance and limitations for a court when considering a motion under 18 U.S.C. § 3582(c)(2) and implements 28 U.S.C. § 994(u), which provides: "If the Commission reduces the term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses, it shall specify in what circumstances and by

what amount the sentences of prisoners serving terms of imprisonment for the offense may be reduced." The Supreme Court has concluded that proceedings under section 3582(c)(2) are not governed by United States v. Booker, 543 U.S. 220 (2005), and this policy statement remains binding on courts in such proceedings. See Dillon v. United States, 560 U.S. 817 (2010).

Among the factors considered by the Commission in selecting the amendments included in subsection (d) were the purpose of the amendment, the magnitude of the change in the guideline range made by the amendment, and the difficulty of applying the amendment retroactively to determine an amended guideline range under subsection (b)(1).

The listing of an amendment in subsection (d) reflects policy determinations by the Commission that a reduced guideline range is sufficient to achieve the purposes of sentencing and that, in the sound discretion of the court, a reduction in the term of imprisonment may be appropriate for previously sentenced, qualified defendants. The authorization of such a discretionary reduction does not otherwise affect the lawfulness of a previously imposed sentence, does not authorize a reduction in any other component of the sentence, and does not entitle a defendant to a reduced term of imprisonment as a matter of right.

The Commission has not included in this policy statement amendments that generally reduce the maximum of the guideline range by less than six months. This criterion is in accord with the legislative history of 28 U.S.C. § 994(u) (formerly § 994(t)), which states: "It should be noted that the Committee does not expect

that the Commission will recommend adjusting existing sentences under the provision when guidelines are simply refined in a way that might cause isolated instances of existing sentences falling above the old guidelines or when there is only a minor downward adjustment in the guidelines. The Committee does not believe the courts should be burdened with adjustments in these cases." S. Rep. 225, 98th Cong., 1st Sess. 180 (1983).*

* So in original. Probably should be "to fall above the amended guidelines".

5. United States Sentencing Guidelines § 6B1.2(c) (2014) provides:

Standards for Acceptance of Plea Agreements (Policy Statement)

(c) In the case of a plea agreement that includes a specific sentence (Rule 11(c)(1)(C)), the court may accept the agreement if the court is satisfied either that:

(1) the agreed sentence is within the applicable guideline range; or

(2) (A) the agreed sentence is outside the applicable guideline range for justifiable reasons; and (B) those reasons are set forth with specificity in the statement of reasons form.

No. 17-155

IN THE

Supreme Court of the United States

ERIK LINDSEY HUGHES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTRODUCTION 1

ARGUMENT 2

I. Mr. Hughes Is Eligible For Relief Under § 3582(c)(2) Because His Sentence Was Based On The Guidelines..... 2

A. A sentence is "based on" the Guidelines when the Guidelines bear a reasonably close connection to it. 2

B. The Government's rule is inconsistent with § 3582(c)(2)'s purposes..... 8

C. Mr. Hughes is eligible to seek relief..... 11

II. The Court Of Appeals Erred By Treating The *Freeman* Concurrence As Binding..... 12

A. The government's criticisms of the logical-subset test lack merit..... 13

B. The government's approach to *Marks* is untenable..... 15

C. The *Freeman* concurrence is neither a logical subset nor a "middle ground" 20

D. Judicial administration would be better served by abandoning *Marks* than by adopting the government's approach. 21

CONCLUSION..... 25

TABLE OF AUTHORITIES

Cases

Abbas v. Foreign Policy Grp., LLC,
783 F.3d 1328 (D.C. Cir. 2015) 24

Bobby v. Dixon,
565 U.S. 23 (2011) 19

City of Ontario v. Quon,
560 U.S. 746 (2010) 19

Dillon v. United States,
560 U.S. 817 (2010) 7

Freeman v. United States,
564 U.S. 522 (2011) 5, 6, 8, 9, 12, 21

Furman v. Georgia,
408 U.S. 238 (1972) 14

Gardner v. Florida,
430 U.S. 349 (1977) 15

Graham v. Florida,
560 U.S. 48 (2010) 15, 17

Gregg v. Georgia,
428 U.S. 153 (1976) 14

Grutter v. Bollinger,
539 U.S. 306 (2003) 17, 20

Harmelin v. Michigan,
501 U.S. 957 (1991) 15

Hemi Grp., LLC v. City of New York,
559 U.S. 1 (2010) 3, 7

Kimble v. Marvel Entm't, LLC,
135 S. Ct. 2401 (2015) 22

King v. Palmer,
950 F.2d 771 (D.C. Cir. 1991) 2, 13, 14, 20

Landgraf v. USI Film Prods.,
511 U.S. 244 (1994) 9

Lubben v. Selective Serv. Sys. Local Bd. No. 27,
453 F.2d 645 (1st Cir. 1972) 5

Manzanares v. City of Albuquerque,
628 F.3d 1237 (10th Cir. 2010) 5

Marbury v. Madison,
5 U.S. (1 Cranch) 137 (1803) 19

Marks v. United States,
430 U.S. 188 (1977) 14, 16

Maslenjak v. United States,
137 S. Ct. 1918 (2017) 23

Missouri v. Seibert,
542 U.S. 600 (2004) 19, 24

Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.,
460 U.S. 1 (1983) 19, 20

Nichols v. United States,
511 U.S. 738 (1994) 20

OBB Personenverkehr AG v. Sachs,
136 S. Ct. 390 (2015) 4

O'Dell v. Netherland,
521 U.S. 151 (1997) 15, 16

Panetti v. Quarterman,
551 U.S. 930 (2007) 17

Regents of Univ. of Cal. v. Bakke,
438 U.S. 265 (1978) 17

Saudi Arabia v. Nelson,
507 U.S. 349 (1993) 4

Staub v. Proctor Hosp.,
562 U.S. 411 (2011) 3

United States v. Carrizales-Toledo,
454 F.3d 1142 (10th Cir. 2006) 24

United States v. Carrozza,
4 F.3d 70 (1st Cir. 1993) 8

United States v. Davis,
825 F.3d 1014 (9th Cir. 2016) 24

United States v. Duvall,
740 F.3d 604 (D.C. Cir. 2013) 22

United States v. Epps,
707 F.3d 337 (D.C. Cir. 2013) 24

United States v. Jacobsen,
466 U.S. 109 (1984) 20

United States v. Ray,
803 F.3d 244 (6th Cir. 2015) 24

United States v. Rodriguez,
No. 92-2065, 1992 WL 309843
(7th Cir. Oct. 27, 1992) 8

United States v. Yemitan,
70 F.3d 746 (2d Cir. 1995) 8

Statutes

18 U.S.C. § 3553(a) 4

18 U.S.C. § 3553(a)(4) 5

18 U.S.C. § 3582(c)(2) 1, 2, 4, 7, 9, 10, 11

18 U.S.C. § 3742(c) 8

28 U.S.C. § 1605 4

Rules and Guidelines

Fed. R. Civ. P. 60(b)(5) 5

U.S.S.G. § 1B1.10 (2013) 9

U.S.S.G. § 1B1.10(b) (2013) 7

U.S.S.G. § 1B1.10(b)(1) (2013) 7

U.S.S.G. § 6B1.1(c) (2013) 6

U.S.S.G. § 6B1.2(c) (2013).....5, 7

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William J. Brennan, Jr., *In Defense of Dissents*, 37 Hastings L.J. 427 (1986).....19

Brief in Opposition, *Tyrrell v. United States*, No. 08-910, 2009 WL 1354417 (U.S. May 13, 2009) 14

A.M. Honoré, *Ratio Decidendi: Judge and Court*, 71 Law Q. Rev. 196 (1955).....16

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Antonin Scalia, *Dissents*, OAH Mag. of Hist., Fall 1998 2

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INTRODUCTION

The government advocates a position that five Justices rejected in *Freeman*: that a sentence imposed following a C-type agreement that recommends a specific term of imprisonment is never based on the Guidelines. Its theory is that § 3582(c)(2) fixates on the moment of sentencing, regardless of what actually caused the judge to accept the agreement and impose the sentence, or what drove the agreement itself. That argument ignores the rule that a legally relevant cause need not be the *last* one. And it ignores the clear link between Guidelines and sentence set out in the statutory scheme and demonstrated by this record.

The government further urges the Court not to clarify *Freeman*—because deciding anything but the application of *Marks* "is contrary to the thrust of petitioner's argument at the certiorari stage." Respondent's Br. (RB) 17. Nonsense. The government objected similarly, in its Brief in Opposition, that the *Freeman* issue could pretermit evaluating *Marks*, and the Court granted review without limiting the questions presented. The Court may address those questions as it sees fit.

As for *Marks*, the Court should reject the government's unprecedented theories. The government first asserts, with minimal elaboration, that the *Freeman* concurrence controls because it occupies a "middle ground." But *Marks* never speaks of a "middle ground," and the government never explains how a rationale rejected by eight Justices can be the law of the land. "*Marks* is workable ... only when one opinion

is a logical subset of other, broader opinions," a condition not satisfied here. *King v. Palmer*, 950 F.2d 771, 781 (D.C. Cir. 1991) (en banc).

The government alternatively contends that even if no opinion "qualifies as narrowest under *Marks*," a lower court must "run[] a case through multiple opinions"—including dissents—"to establish which litigant would prevail under the views of five Justices." RB14. That theory misapprehends why decisions are afforded precedential effect. "Legal opinions are important ... after all, for the *reasons* they give, not the *results* they announce." Antonin Scalia, *Dissents*, OAH Mag. of Hist., Fall 1998, at 18. Giving each bare vote precedential effect would depart from centuries of practice. The Court should decline that invitation.

ARGUMENT

I. Mr. Hughes Is Eligible For Relief Under § 3582(c)(2) Because His Sentence Was Based On The Guidelines.

A. A sentence is "based on" the Guidelines when the Guidelines bear a reasonably close connection to it.

1. Mr. Hughes is eligible to seek relief under § 3582(c)(2) because his sentence was based on a Guidelines range that subsequently was reduced. The judge accepted the plea agreement and imposed the sentence only because he concluded that the sentence was consistent with the Guidelines. Opening Brief (OB) 35-37. As a matter of plain meaning, a sentence is "based on" the Guidelines when, as here, they were

a "supporting part" of the sentence. OB14 (discussing definitions). Under established principles of causation, a cause must simply bear a reasonably close relation to the result. OB15-17.

The government agrees that plain meaning governs, and points to many of the same definitions. RB39-40. From there, however, it makes arguments about causation that Prosser wouldn't recognize and that conflict with this Court's precedents. For instance, the government suggests, "based on" does not implicate proximate cause. RB46. This Court has said otherwise. OB15; *cf. Hemi Grp., LLC v. City of New York*, 559 U.S. 1, 9 (2010) ("by reason of" requires but-for and proximate cause).

Elsewhere, the government suggests there can only be *one* relevant cause. RB47. But it never disputes the basic principle that it is "common" for an event to have multiple proximate causes. OB16 (quoting *Staub v. Proctor Hosp.*, 562 U.S. 411, 420 (2011)). And, as the Opening Brief shows (OB19-22), a sentence can be based on both the parties' agreement and the judge's rationale.

To avoid these basic causation principles, the government takes two tacks. The first is a semantic daisy chain. It plucks out one favored definition ("foundation"); transmogrifies it into "legal foundation," RB15, 39, a term of its own invention; and then equates it with "critical" or "determinative legal components," RB42, 46. If by this the government means the Guidelines are not important to the sentence, that is incorrect. The court cannot accept the plea agreement or

impose the sentence without considering the Guidelines, and commonly relies on them to justify the sentence. OB24-25; *infra* 5. If instead the government means that the Guidelines must "alone" determine the sentence, RB41, that would render § 3582(c)(2) a nullity. No one cause is ever determinative; a judge is required to consider multiple factors before imposing any sentence. 18 U.S.C. § 3553(a).

Second, the government suggests decisions interpreting "based upon" in the FSIA support some different standard. RB39-42, 46. On the contrary, as the Opening Brief explains (OB15), those cases illustrate that a "base" or "foundation" is a necessary element with a close connection to the result—i.e., a proximate cause. Under the FSIA, a legal "action" is "based upon" the "essentials" of the suit. 28 U.S.C. § 1605; *see OBB Personenverkehr AG v. Sachs*, 136 S. Ct. 390, 397 (2015). The innocent domestic acts in those cases were not bases for the plaintiffs' claims because they were far removed from the tortious conduct abroad. *Saudi Arabia v. Nelson*, 507 U.S. 349, 358 (1993); *Sachs*, 136 S. Ct. at 396.[1] In the sentencing context, the plea

[1] Moreover, any departure from standard causation principles would have been attributable to FSIA-related concerns. *Sachs*, for instance, cautioned that through artful pleading, a plaintiff could make "virtually any" foreign injury actionable, "effectively thwart[ing] the Act's manifest purpose." *Id.* at 396-97; *see also id.* at 397 n.2 (noting the decision's "limited" "reach").

agreement and the judge's assessment of the agreement and sentence both are essential. OB19-23.[2]

2. Applying basic causation principles, there are two ways a C-type sentence can be "based on" a Guidelines range. The first is when the judge relies on the Guidelines. OB19-20. It is the judge who imposes sentence, and he cannot do so without determining that the sentence is acceptable because of, or in spite of, the Guidelines range. *Freeman v. United States*, 564 U.S. 522, 529 (2011) (plurality); 18 U.S.C. § 3553(a)(4); U.S.S.G. § 6B1.2(c). Thus, even under the government's test, the judge's rationale is a "critical legal component" of the sentence. Second, the plea agreement also may be a basis for the sentence; it is the impetus for the sentencing proceedings and, once accepted, binds the court. OB20-22. If that agreement relies on the Guidelines, the Guidelines are a basis for

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[2] The government is wrong (RB42) to rely on decisions interpreting Civil Rule 60(b)(5), which permits relief from a judgment "based on an earlier judgment that has been reversed or vacated." The context is entirely different. Massive disruption would result "'were courts compelled to re-litigate past cases whenever they glimpsed a material change in decisional law.'" *Manzanares v. City of Albuquerque*, 628 F.3d 1237, 1240 (10th Cir. 2010). Moreover, the cases support Petitioner. Rule 60(b)(5) is not met if the earlier decision was "only precedent"; a later decision is only "based on" an earlier decision that is "necessary" to it. *Lubben v. Selective Serv. Sys. Local Bd. No. 27*, 453 F.2d 645, 650 (1st Cir. 1972). Accordingly, a sentence is *not* "based on" the Guidelines just because the judge consults them, but *is* "based on" a Guidelines range the judge relies on to justify the sentence.

the sentence unless the judge disclaims reliance on them. OB27-28.[3]

Much of the government's response reduces to the idea that, at sentencing, a judge rubber-stamps the sentence based on the agreement he previously accepted. *E.g.*, RB43, 48, 50, 54. This argument fails for multiple reasons.

First, it ignores that judges ordinarily consider the agreement in tandem with sentencing. OB18-19, 22. That is the procedure recommended by the Sentencing Commission. U.S.S.G. § 6B1.1(c) & cmt. It also is what happened here. OB8, 22-23. During a single proceeding, the judge considered the Guidelines range and determined that the sentence "complie[d]... with the[ir] spirit." Pet. App. 32a-33a.

The government's narrow focus on the moment of sentencing also ignores that a proximate cause need not be the last one. OB22. Regardless when the court assesses the agreement—whether at the time of sentencing, as here, or before—the judge cannot accept a

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[3] The government is wrong that this standard is difficult to administer. RB47 n.4. If the judge calculates the Guidelines range but disregards it and imposes the sentence for non-Guidelines reasons, the sentence is not based on the Guidelines. If the judge imposes a sentence in part *because of* the Guidelines range, the sentence bears a direct relation to, and is based on, the Guidelines. Usually the judge's statements and the parties' explanations on the record will answer the question. *Freeman*, 564 U.S. at 530-31 (plurality). Occasionally, if the record is not clear, a court may look to the agreement to fill any gaps. OB20-22. The government has identified no difficulty applying that standard in the courts that do so.

plea agreement and impose a sentence without determining that the sentence is justified. OB18-19, 25-26; U.S.S.G. § 6B1.2(c).

That a proximate cause requires a "direct relation" between a cause and an effect, RB47, does not change the result. The government's cases merely reaffirm the uncontroversial principle that a proximate cause cannot be "'too remote,' 'purely contingent,' or 'indirec[t].'" *Hemi*, 559 U.S. at 9; OB16. The judge's rationale is not "somewhere along the causal chain." RB15. It is a "direct" cause of accepting the agreement and imposing the sentence; it is essential to the sentence, and legally required. *Supra* 5; OB18-19. The same may be true of the agreement itself. OB20-22.

3. For similar reasons, U.S.S.G. § 1B1.10(b) does not support the government. RB49. That policy statement limits the scope of resentencing, making clear that under § 3582(c)(2), a court merely substitutes amended Guidelines provisions for those "that were applied when the defendant was sentenced." § 1B1.10(b)(1). In short, it prohibits plenary resentencing. *Dillon v. United States*, 560 U.S. 817, 831 (2010). According to the government, this provision means that when the defendant is sentenced pursuant to a C-type plea agreement, only the *agreement* is "applied," not the Guidelines. In short, it would treat this limitation on the *scope* of resentencing as prohibiting sentence reductions following C-type plea agreements. This, however, would be a highly unnatural way to say, "Section 3582 does not apply to C-type agreements."

In fact, Congress made clear that C-type sentences *can* "appl[y]" the Guidelines. 18 U.S.C. 3742(c) forbids *some* appeals from C-type sentences—but explicitly permits appeals concerning an "'incorrect application of the sentencing guidelines.'" OB23, 29. Plainly, therefore, C-type sentences may entail "application of the sentencing guidelines." Tellingly, the government addresses this provision only in a footnote, offers a cursory denial, and protests that we cited only one precedent. RB45 n.3. But the statute is clear, and there are more decisions too. *United States v. Carrozza*, 4 F.3d 70, 86 n.12 (1st Cir. 1993); *United States v. Rodriguez*, No. 92-2065, 1992 WL 309843, at *1 (7th Cir. Oct. 27, 1992); *see also United States v. Yemitan*, 70 F.3d 746, 748 (2d Cir. 1995).

B. The Government's rule is inconsistent with § 3582(c)(2)'s purposes.

1. The government contends that allowing defendants who enter into C-type agreements to seek sentence reductions would deprive the government of the benefit of some bargain. RB52-53. That argument was correctly rejected in *Freeman*. 564 U.S. at 531 (plurality), 540-41 (concurrence); OB34-35. That the government may have made "substantial concessions" (RB52) "has nothing to do with whether a sentence is 'based on' the Guidelines." 564 U.S. at 531 (plurality).

And when a sentence *is* based on the Guidelines, there is every reason to revisit the plea negotiation. That is because the Guidelines are not just another factor. *Id.* at 538 (concurrence); *see* OB23-26; NACDL Br. 5-8. Changing the Guidelines range alters the

very "foundation" of the agreement. And if the government believes it made such great concessions that a sentence reduction is unwarranted, it may urge a court to deny relief. 564 U.S. at 541 n.6 (concurrence); U.S.S.G. § 1B1.10, cmt. n.1(B)(i).

The government also invokes finality, RB38-39, 43-45, and argues that defendants who enter into plea bargains surrender the benefit of any later change in the law, RB51-52, 55. By that logic, however, sentence reductions would be foreclosed for defendants who enter into A- and B-type plea agreements, which plainly is wrong. And concerns about finality are misplaced, given that § 3582(c)(2) is expressly retroactive. *See Landgraf v. USI Film Prods.*, 511 U.S. 244, 280 (1994). In addition, presuming that defendants who enter into C-type agreements have silently waived § 3582(c)(2) eligibility runs contrary to ordinary principles of contract law and special concerns governing waivers in plea agreements. OB35.

Ultimately, the government's argument rests on the faulty premise that § 3582(c)(2) sentence reductions are bad for the government and good for defendants. But § 3582(c)(2) applies only when the Commission has determined sentence reductions to be socially valuable. The Commission adopted Amendment 782, for example, after concluding that reducing the prison population would free up resources for public safety measures without increasing recidivism or affecting incentives to plead guilty. OB8-9; Berman Br. 8-13.

2. A rule excluding C-type defendants from § 3582(c)(2) would create arbitrary disparities the

statute is designed to avoid. OB28-33. The government's claimed policy considerations do not prove otherwise.

First, the government observes that defendants can gain concessions from the government by entering into plea agreements. RB52. But this proves too much; it also would bar sentence reductions for A- and B-type defendants. *Second*, the government speculates that a defendant who obtains § 3582(c)(2) relief could fare better than a "defendant ... sentenced after the Guidelines change had occurred" because the judge in the former case might afford relief that a prosecutor in the latter case would not. RB54. But this also is true of other types of plea agreements, and ignores the countervailing disparities caused by the government's rule. OB29-31. *Third*, the government says defendants who enter into C-type agreements should be treated differently because they "agree[] to a specific sentence." RB53. But regardless the type of plea agreement at issue, a retroactively reduced sentence may differ from it. The government offers no authority that the supposed "windfall" to defendants is limited to, or even most pronounced for, C-type agreements.

Equally arbitrary is the distinction the government draws between a sentencing *range* (which, it says, qualifies for § 3582(c)(2) relief) and a term of months (which it says does not). RB48-49. On this view, a sentence would be "based on" the Guidelines if a C-type agreement recommended a Guidelines range of 160-200 months and the judge imposed a 180-month sentence. But a sentence would *not* be

"based on" the Guidelines if the agreement recommended (and the judge imposed) a 180-month sentence while explaining that this term falls in the middle of the Guidelines range. This result is utterly counterintuitive. It is at odds with the government's own anti-retroactivity arguments, which logically would foreclose relief in both situations. And it means that eligibility for § 3582(c)(2) relief will be predicated on the way the prosecutor draws up the plea agreement, a factor over which a defendant usually has little control. NACDL Br. 9-11; OB31-33.

C. Mr. Hughes is eligible to seek relief.

The government never explicitly disputes that, under Mr. Hughes's reading of § 3582(c)(2), he will prevail. And properly so: The Guidelines range bore a direct and close connection to his sentence. OB35-37.

At times, however, the government does offer contrary suggestions. None changes the result. The government maintains (RB54) that the judge did not calculate the Guidelines range until after accepting the agreement. That is an implausible mincing of the transcript. The judge made clear that he "considered ... the sentencing guidelines," as he was legally required to do, and determined that the agreement "complies" with their "spirit," Pet. App. 32a-33a; OB36, before accepting the agreement. He then discussed the Guidelines range with the parties, confirming his previous calculations. Pet. App. 36a (range discussed with the parties was "what [he] had originally put down").

Elsewhere, the government says there is no proof the judge would have refused to accept the agreement (or the prosecutor would have offered a better deal), had the amended Guidelines been in effect at the time of sentencing. RB54-55. But what judge ever would say, "Under hypothetical Guidelines that don't exist today, here's the sentence I would impose"? Certainly the statute does not impose this unorthodox evidentiary burden. What matters is that the Guidelines range was an important factor underlying the sentence, as it was here. OB36-37.

The government also speculates that the *agreement* may not have been based on the Guidelines. RB54. The government's extra-record musings are even worse than the ill-advised effort to "engage in a free-ranging search through the parties' negotiating history" that every Justice in *Freeman* rejected. 564 U.S. at 538 (concurrence), 532-33 (plurality), 551 (dissent). Regardless of how the parties arrived at the recommended sentence, the Guidelines are a basis for the sentence because the judge relied on them.

II. The Court Of Appeals Erred By Treating The *Freeman* Concurrence As Binding.

The government urges the Court to retain the splintered *Freeman* decision and offer no further guidance to lower courts, on the theory that *Freeman* is binding so there is nothing more to be done. But the government never acknowledges that its position would mean giving binding effect to a rationale that eight Justices rejected. It never confronts the fact that its position is predicated on giving precedential weight to dissenting votes. And it never mentions that

the government itself repeatedly has advanced the "logical subset" test, including in this Court. If the Court is to retain *Marks* at all, the logical-subset test is the only approach consistent with longstanding rules about judicial reasoning and majority decision-making.

A. The government's criticisms of the logical-subset test lack merit.

1. A non-majority opinion embodies a narrowest ground only when its reasoning is a logical subset of opinions joined by a majority of Justices. OB38-44. Any other approach would turn minority views into nationwide precedent, and would be hopelessly indeterminate. OB44-51. The government responds that this test is contrary to *Marks* itself. RB22. Not so. *Marks* did not define "narrowest grounds," and the decisions *Marks* interpreted confirm that one opinion is narrower when it is a logical subset of another.

Specifically, *Marks* treated the plurality in *Memoirs v. Massachusetts* as controlling where two other Justices "concurred on broader grounds"—i.e., "that the First Amendment provides an absolute shield" against obscenity prosecutions. 430 U.S. 188, 193 (1977); OB40-42. As the government previously has explained, the two absolutist Justices in *Memoirs* "'had to agree, *as a logical consequence of their own position*, with the plurality's view that anything with redeeming social value is not obscene.'" Petition for Writ of Certiorari, *United States v. McWane, Inc.*, No. 08-223, 2008 WL 3884295, at *21 (U.S. Aug. 21, 2008) (emphasis added) (quoting *King*, 950 F.2d at 781);

Brief in Opposition, *Tyrrell v. United States*, No. 08-910, 2009 WL 1354417, at *7-8 (U.S. May 13, 2009).[4]

The government also argues (RB22) that the logical-subset rule is wrong because *Marks* applies only when "no single rationale explaining the result enjoys the assent of five Justices." 430 U.S. at 193. But in context, this phrase plainly refers to the lack of a majority *opinion*. Just sentences earlier, *Marks* discussed a prior decision "in which a majority united in a *single opinion announcing the rationale* behind the Court's holding." *Id.* (emphasis added). Even when five Justices do not formally join a single opinion, there can be shared reasoning among the opinions supporting the judgment. OB43-44. Thus, the government previously has explained, "[i]n some (if not most) fractured decisions, the narrowest rationale adopted by one or more Justices who concur in the judgment will be the only controlling principle on which a majority of the Court's Members agree." *McWane* Pet. *20. The logical-subset test is not remotely "contrary to forty years of precedent." RB22.

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[4] The opinions in *Furman v. Georgia*, 408 U.S. 238 (1972), also share a logical relationship, as the plurality noted in *Gregg v. Georgia*, 428 U.S. 153 (1976). OB41-42. The three Justices who believed the death penalty "unconstitutional in all circumstances" or "pregnant with discrimination" would logically agree with two Justices who took the narrower view that the death penalty is "unconstitutional when administered in an arbitrary and capricious manner." *King*, 950 F.2d at 781 (describing *Furman*). This was the critical "view" in *Furman*, 428 U.S. at 188 n.36, as was made clear by the same footnote in *Gregg* that spoke of "narrowest grounds," *id.* at 169 n.15.

2. The government argues that the logical-subset test is "irreconcilable" with "later applications of *Marks*." RB26. It cites *Graham v. Florida*, 560 U.S. 48, 59-60 (2010), which refers to the plurality in *Harmelin v. Michigan*, 501 U.S. 957 (1991), as "controlling." But *Graham* did not cite *Marks* or explain whether the *Harmelin* plurality represented a "narrowest ground." In fact, the proportionality rules in *Harmelin* were logical subsets. But ultimately, *Graham* didn't even rely on *Harmelin*, which was not "suited for considering" the Eighth Amendment question in *Graham*. 560 U.S. at 61.

O'Dell v. Netherland, 521 U.S. 151 (1997), is an equally slim reed. *O'Dell* (unlike *Graham*) mentioned *Marks*, but without analysis. In two brief passages, it said that, even "taking" Justice White's concurrence in *Gardner v. Florida*, 430 U.S. 349 (1977) as the narrowest grounds, that opinion did not dictate a subsequent rule for purposes of *Teague v. Lane*. 521 U.S. at 160, 162. These unelaborated references offer little guidance.

B. The government's approach to *Marks* is untenable.

1. Having abandoned the logical-subset test, the government cobbles together snippets of cases to derive a two-part description of what it says the Court previously has done: (1) follow the "middle-ground opinion falling between plurality and dissenting views that produces results accepted by five Justices in every case," or (2) "ask[] which litigant would have prevailed under the rationales of at least five Justices

by running the facts at hand through multiple opinions." RB18-19. Which of these two very different things a court should do when, the government never says.

We address each of the government's approaches individually, but first, more fundamentally, it is the government's position rather than ours that "cannot be squared with *Marks*." RB22. Each of the government's alternatives would have a lower court count dissenting votes in determining an opinion's precedential value. *E.g.*, RB17 (arguing that Petitioner is ineligible for resentencing "under the approaches of five Justices in *Freeman*," four of whom dissented). *Marks*, however, is explicit that the Court's holding is "'that position taken by those Members *who concurred in the judgment[]* on the narrowest grounds.'" 430 U.S. at 193 (emphasis added). *O'Dell* likewise considered which opinion "provid[ed] the narrowest grounds of decision among the Justices *whose votes were necessary to the judgment*." 521 U.S. at 160 (emphasis added). A dissenter, of course, votes *against* the judgment.

If dictum has no stare decisis effect, OB46, then *a fortiori* a dissent does not. Dissenting opinions "cannot form part of the *ratio decidendi* of a case [because] they are not reasons for the order made by the court ...." A.M. Honoré, *Ratio Decidendi: Judge and Court*, 71 Law Q. Rev. 196, 198 (1955). Dissents may be written for different audiences, or different purposes, and they do not establish nationwide precedent. *See* Agricultural Interests Br. 17-19 (citing authorities); Sackett Br. 12; Ryan C. Williams, *Questioning* Marks, 69 Stan. L. Rev. 795, 818-19, 851-52 (2017).

2. The government's proposed rules each suffer from additional defects.

First, the government asserts, with no real explanation, that "middle-ground opinion[s]" get precedential effect. RB18. What a middle ground is, the government never quite says. The government cites two supposed "middle-ground" cases, *id.*, but they are hardly instructive.[5] And if "middle ground" were a rule, surely it would have been applied numerous times by now, rather than in passing statements in two cherry-picked cases. That, however, has not been the norm. *E.g.*, *Grutter v. Bollinger*, 539 U.S. 306, 325 (2003) (declining to treat concurrence in a 4-1-4 split in *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978), as controlling under *Marks*). Replacing "narrowest grounds" with "middle ground" hardly would provide clarity to lower courts.

The closest the government comes to defining this term is a suggestion that an opinion is a middle ground when it "produces results accepted by five Justices in every case." RB18. This test is indeterminate and illegitimate. It requires relying on dissenting votes. *Supra* 16. It will require defining what makes a particular ground "middle" and what it means for a

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[5] The first is *Graham*, discussed above (at 17). In the other, *Panetti v. Quarterman*, the Court did cite *Marks*, and concluded that a prior concurrence by Justice Powell controlled because it "offered a more limited holding" than the plurality. 551 U.S. 930, 949 (2007). But *Panetti* was a case involving a logical subset. *See* Williams, *supra*, at 842 ("[A] procedure failing Justice Powell's relaxed due process test would also fail [the plurality's] preferred standard."). Neither case approved looking at dissents.

splintered decision "always" to "achieve majority-favored results." RB34. *But cf.* RB31 (criticizing other *Marks* approaches for their supposedly "uncertain inquiry"). It will necessitate the same assessment of "idiosyncratic hypothetical[s]" that the government elsewhere faults. RB37. And it will privilege opinions that may appear to be in the middle only because no Justice has joined them—and give them precedential force even when a majority of Justices disagree with their rationale. OB47; *McWane* Pet. *23. That extraordinary result runs contrary to all reason, and the government never squarely defends it (having previously disavowed it).

3. The balance of the government's argument is devoted to an alternative inquiry it calls "the *Marks* approach," but which has little to do with *Marks*. The government says precedent is created whenever a lower court can determine "which litigant would have prevailed under the rationales of at least five Justices by running the facts at hand through multiple opinions." RB19. That bears no resemblance to *Marks*, which requires looking for the "narrowest grounds" of a decision. In opposing our petition for certiorari, the government embraced *Marks* itself, arguing that *Freeman* has a "'narrowest grounds' that represents the Court's holding." Br. in Opp. 10. Now, the lion's share of the government's argument is devoted to its alternative, vote-counting algorithm.

But when there is not even a "narrowest" opinion, there cannot be binding precedent. The government's approach mistakenly views precedent as merely predicting votes of individual Justices, without regard for the reasoning that produces them. But this Court

acts—and creates precedent—through *reasoned* opinions. OB39-40, 45-46. "Those who apply the rule to particular cases, must of necessity expound and interpret that rule." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803); *accord* William J. Brennan, Jr., *In Defense of Dissents*, 37 Hastings L.J. 427, 435 (1986) ("[A] court may not simply announce, without more, that it has adopted a rule to which all must adhere. ... Courts *derive* legal principles, and have a duty to explain *why* and *how* a given rule has come to be."); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv. L. Rev. 1, 5 (1959) ("[A] position cannot be divorced from its supporting reasons; the reasons are, indeed, a part and most important part of the position ....").

The government claims support from isolated statements in opinions that do not even mention *Marks*. RB19, 35-36. The per curiam decision in *Bobby v. Dixon*, for example, merely concluded that no opinion in *Missouri v. Seibert*, 542 U.S. 600 (2004), created clearly established law justifying habeas relief. 565 U.S. 23, 31-32 (2011). In *City of Ontario v. Quon*, the Court said nothing about *Marks*, and found it "not necessary to resolve" whether a prior plurality controlled; indeed, the plaintiff would lose under any judgment-supporting standard in the prior decision. 560 U.S. 746, 757 (2010).[6] The government has not

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[6] The government's other citations (RB19) are further afield. In *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, the Court referred to the votes of dissenting Justices, but only to show that a four-Justice plurality could not overrule prior

identified any case in which the Court called for "running the facts at hand through multiple opinions" of a fractured decision when no narrowest ground can be identified. RB19. Were this approach required, and if it provided the certainty the government claims, the Court would have employed it in the cases where the Court instead declined to "'pursue the *Marks* inquiry'" and proceeded directly to the merits. *Grutter*, 539 U.S. at 325 (quoting *Nichols v. United States*, 511 U.S. 738, 745-46 (1994)).

C. The *Freeman* concurrence is neither a logical subset nor a "middle ground."

Under the logical-subset test, the government cannot prevail, and it does not contend otherwise. The concurrence is not a "common denominator of the Court's reasoning." *King*, 950 F.2d at 781; OB5-6, 51-52.

Nor is the *Freeman* concurrence a "middle ground." Once dissenting votes are set aside, the concurrence does not "produce[] results accepted by five Justices in every case," RB18, because there are cases "in which [the *Freeman* concurrence] would allow a sentence reduction but the plurality would not," RB34.

First, a defendant would prevail under the concurrence, but not the plurality, if his plea agreement was based explicitly on the Guidelines but the court

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precedent. 460 U.S. 1, 17-18 (1983). And *United States v. Jacobsen* quoted a lead opinion and dissent, but did not specify their precedential force, if any. 466 U.S. 109, 115-17 (1984).

declined to apply the Guidelines for policy reasons. OB53-54. The government's only response (RB34) is to change the hypothetical. It quotes the plurality's observation that a sentence may still be based on the Guidelines, "[e]ven where the judge varies from the recommended range," so long as "the judge uses the sentencing range as the beginning point to explain the decision to deviate from it." 564 U.S. at 529-30. That is correct, as we have said. OB26. But our example here posits a judge who declines to rely on the Guidelines altogether. OB28.

Second, a defendant would prevail under the concurrence, but not the plurality, if the parties agreed to one range but the court concluded that another range applied—because of either a mistake or the parties' indifference. OB54-55. The government disagrees (RB35), but its sole support is the plurality's statement that the Guidelines are part of a judge's "'analytic framework.'" *Id.* What mattered to the plurality, however, was "the analytic framework the judge used to determine the sentence." 564 U.S. at 530. If the plea agreement used a range that later was lowered, but "the judge used" a range that remained the same, the defendant would only be eligible for resentencing under the concurrence.

D. Judicial administration would be better served by abandoning *Marks* than by adopting the government's approach.

The best alternative to the logical-subset test is not the government's; it would be returning to true majority rule. OB38-40. *Marks* has generated uncer-

tainty and confusion. OB55-59. The government responds that *Marks* is cited a lot. RB32 (citing Richard Re, *Beyond the* Marks *Rule* 11 (Jan. 5, 2018), https://tinyurl.com/y8wwqnnn (forthcoming Harv. L. Rev.)). But the scholar who compiled those citations explains that they reflect widespread confusion: "[T]he cases that are most often '*Marks*'d' have tended to generate intractable circuit splits," and "[o]ther frequently *Marks*'d cases ... have yielded little guidance." Re Br. 16. Nor has the government shown that those decisions support its newfound theory of *Marks*.

Next, the government says its approach would further "'[v]ertical stare decisis'" and "national uniformity." RB19-20. That assertion is predicated on the superficial notion that more precedent is better than less. RB20, 31-32. All things being equal, of course that is true. But the government's approach will not generate precedent or uniformity.

Uniformity exists when precedent is clear. *Marks* hasn't created such clarity. *See* OB48-51. The government therefore pins its hopes on its extra-*Marks* vote-counting algorithm. RB18-19, 33, 35-37; *supra* 18-20. But that "corollary" to *Marks* applies only when there is no "narrowest ground." *United States v. Duvall*, 740 F.3d 604, 611 (D.C. Cir. 2013) (Kavanaugh, J.). By its terms, therefore, it matters only when there is no rationale embraced by a majority, and so all it can do is predict votes. RB36. A mere bottom line, however, in the absence of a governing rationale, does little to "'promote[] the evenhanded, predictable, and consistent development of legal *principles*.'" *Kimble v. Marvel Entm't, LLC*, 135 S. Ct. 2401, 2409 (2015) (em-

phasis added). That doesn't mean that splintered decisions are "good for one day only," RB19; they still provide guidance. But actual *precedent* "is generally concerned with reasons and rationales, not mere outcomes." Re Br. 3; Wechsler, *supra*, at 19-20 ("The virtue or demerit of a judgment turns ... entirely on the reasons that support it ...."); *supra* 18-19. That is why judgments issued by an evenly divided Court generate no precedent, despite yielding a clear outcome: "judgment affirmed." RB28.

The Court's own practices belie the idea that uniformity must be pursued at all costs. The discretionary certiorari docket lets some circuit splits persist while allowing "the experience of ... thoughtful colleagues on the district and circuit benches" to "yield insights (or reveal pitfalls) [the Court] cannot muster guided only by [its] own lights." *Maslenjak v. United States*, 137 S. Ct. 1918, 1931 (2017) (Gorsuch, J., concurring in part and concurring in the judgment); *see* OB58; Re Br. 13. Encouraging lower courts to short-circuit their legal reasoning in favor of predictive vote-counting will diminish the quality of that percolation. The government's further claim that any approach other than its own will cause "disuniformity," RB22, presumes that circuit splits inevitably will ensue that the Court never will resolve—and ignores the conflicts created by *Marks* itself. And its assertions about inconsistent results (for instance, between Freeman and his hypothetical co-defendant, RB29), simply assume that a lower court will reach the wrong answer.

Nor is the government's approach supported by "administrability considerations." RB30. The government concedes that often, and perhaps in this very case, it will not be possible to identify a "middle ground." RB14. And the government's vote-counting approach presents its own difficulties. It applies only in circumstances where a legal question is sufficiently complicated that the Court splintered and there was no middle ground. And, it will require lower courts—in those already-difficult contexts—to "run" the facts through at least three opinions. It will provide no answers when the dissenting justices "did not address the question" that divided the Justices concurring in the judgment. *Abbas v. Foreign Policy Grp., LLC*, 783 F.3d 1328, 1337 (D.C. Cir. 2015) (Kavanaugh, J.). And even in the best of all worlds, it could only dictate results in certain cases, not create precedent.

The better rule is the logical-subset approach, which merely requires a court to assess whether one rule nests within another, OB42-43, and which does establish precedent. Contrary to the government's warnings (RB31), this rule has proven simple to apply,[7] as the government surely recognized when advocating this rule previously. And if the Court is wary of *Marks*, the simplest rule of all is that only majority opinions have precedential force. That rule would

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[7] *Compare United States v. Epps*, 707 F.3d 337 (D.C. Cir. 2013), *with United States v. Davis*, 825 F.3d 1014 (9th Cir. 2016) (en banc) (agreeing that no opinions in *Freeman* are logical subsets); *compare United States v. Ray*, 803 F.3d 244, 271-72 (6th Cir. 2015), *with United States v. Carrizales-Toledo*, 454 F.3d 1142, 1151 (10th Cir. 2006) (same, with respect to *Missouri v. Seibert*).

avoid the mess made by *Marks*, and would create salutary incentives for the Court to coalesce around narrow majorities. OB58-59. The government's approach offers no such advantages.

CONCLUSION

The Court should reverse or vacate the decision below.

Respectfully submitted,

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No. 17-155

In the Supreme Court of the United States

ERIK LINDSAY HUGHES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF AMICUS CURIAE FOR AGRICULTURAL, BUILDING, FORESTRY, LIVESTOCK, MANUFACTURING, MINING, AND PETROLEUM BUSINESS INTERESTS IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page

Table of Authorities ii

Interest of the *Amici Curiae* 1

Introduction and Summary of Argument 5

Argument 8

The Fractured *Rapanos* Decision Offers A Case Study That Should Inform The Court's Approach In This Case 8

A. Justice Kennedy's concurrence in *Rapanos* is not controlling 10

B. Justice Stevens's dissenting opinion in *Rapanos* is not entitled to any weight. 17

C. Courts should give weight to those conclusions shared by the plurality and concurring opinion in *Rapanos*. 19

1. Applying both opinions. 20

2. Finding points of agreement. 21

3. Treating all of the majority opinions as persuasive authority 24

D. Other common law jurisdictions agree with the approaches we have proposed. 25

Conclusion 28

TABLE OF AUTHORITIES

Page(s)

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A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. *Attorney General of Massachusetts*, 383 U.S. 413 (1966) 11, 12

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512 U.S. 1 (1994) 17

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531 U.S. 159 (2001) 7, 20, 24

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958 F.2d 1176 (2d Cir. 1992) 21

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315 F.3d 179 (2d Cir. 2003) 13

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571 F.3d 791 (8th Cir. 2009) 14

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437 F. Supp. 2d 605 (N.D. Tex. 2006) 24

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555 F.3d 200 (6th Cir. 2009) 13, 14, 17, 20

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825 F.3d 1014 (9th Cir. 2016) 13

United States v. *Donovan*,
2010 WL 3000058 (D. Del. July 23,
2010) 14

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661 F.3d 174 (3d Cir. 2011) 14

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740 F.3d 604 (D.C. Cir. 2013) 18

TABLE OF AUTHORITIES—continued

Page(s)

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707 F.3d 337 (D.C. Cir. 2013) 13

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786 F. Supp. 2d 1016 (E.D.N.C.
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516 F.3d 316 (5th Cir. 2008) 20

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Homes, Inc.,
474 U.S. 121 (1985) 7, 20, 24

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875 F.3d 1281 (9th Cir. 2017) 18

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505 F.3d 1208 (11th Cir. 2007) 18

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INTEREST OF THE *AMICI CURIAE*

Amici curiae are trade associations whose members are responsible for a significant proportion of American agricultural, forestry, mining, and energy production, manufacturing, and construction.[1]

The American Farm Bureau Federation (AFBF) is a voluntary general farm organization formed in 1919 to protect, promote, and represent the business, economic, social, and educational interests of American farmers and ranchers. Through its state and county Farm Bureau organizations, AFBF represents about six million member families in all 50 states and Puerto Rico.

The American Forest & Paper Association (AF&PA) serves to advance a sustainable U.S. pulp, paper, packaging, tissue, and wood products manufacturing industry through fact-based public policy and marketplace advocacy. AF&PA member companies make products essential for everyday life from renewable and recyclable resources and are committed to continuous improvement through the industry's sustainability initiative, Better Practices, Better Planet 2020. The forest products industry accounts for approximately four percent of total U.S. manufacturing GDP, manufactures over $200 billion in products annually, and employs approximately 900,000 men and women.

The American Petroleum Institute (API) is a national trade organization representing over 650 com-

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* or their counsel made a monetary contribution to its preparation or submission. The parties have provided written consent to the filing of this *amicus* brief.

panies involved in all aspects of the domestic and international oil and natural gas industry, including exploration, production, refining, marketing, distribution, and marine activities. API's members include producers, refiners, suppliers, pipeline operators, and marine transporters, as well as service and supply companies that support all segments of the industry.

The Leading Builders of America (LBA) is a national trade association representing 20 of the largest homebuilding companies in North America. Collectively, LBA members build approximately 35% of all new homes in America. Its purpose is to preserve home affordability for American families. LBA member companies build across the residential spectrum from first-time and move-up to luxury and active-adult housing. In each of these segments, its members are leaders in construction quality, energy efficiency, design, and the efficient use of land. Many of its members are also active in urban multi-family markets and also develop traditional and neo-traditional suburban communities.

The National Alliance of Forest Owners (NAFO) is a national advocacy organization committed to advancing federal policies that support the long-term economic, social, and environmental benefits of sustainably managed, privately owned forests. NAFO member companies own and manage more than 43 million acres of private working forests—forests that are managed to provide a steady supply of timber. NAFO's membership also includes state and national associations representing tens of millions of additional acres. NAFO works aggressively to sustain the ecological, economic, and social values of forests and

to assure an abundance of healthy and productive forest resources for present and future generations.

The National Association of Home Builders (NAHB) is a national trade association incorporated in Nevada. NAHB's membership includes more than 140,000 builder and associate members organized into approximately 700 affiliated state and local associations in all 50 states, the District of Columbia, and Puerto Rico. Its members include individuals and firms that construct single-family homes, apartment buildings, condominiums, and commercial and industrial projects, as well as land developers and remodelers.

The National Association of Manufacturers (NAM) is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs more than 12 million men and women, contributes $2.17 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for more than three-quarters of all private-sector research and development in the nation. The NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

The National Cattlemen's Beef Association (NCBA) is the national trade association representing U.S. cattle producers, with more than 30,000 individual members and several industry organization members. NCBA represents more than 175,000 of America's farmers, ranchers and cattlemen who provide a significant portion of the nation's supply of food. NCBA works to advance the economic, political,

and social interests of the U.S. cattle business and to be an advocate for the cattle industry's policy positions and economic interests.

The National Mining Association (NMA) is the national trade association of the mining industry. NMA's members include the producers of most of the Nation's coal, metals, and industrial and agricultural minerals; manufacturers of mining and mineral processing machinery, equipment, and supplies; and engineering and consulting firms that serve the mining industry.

The National Pork Producers Council (NPPC) is an association of 43 state pork producer organizations and the global voice in Washington, D.C., for the nation's 67,000 pork producers. NPPC conducts public policy outreach at both the state and federal level with a goal of meeting growing worldwide consumer demand for pork while simultaneously protecting the water, air, and other environmental resources that are in the care of or potentially affected by pork producers and their farms. NPPC and its members have engaged directly with EPA over the last two decades regarding the development of water quality standards and have made significant capital investments in the design and operation of farms to comply with these environmental regulations.

As frequent litigants in courts at every level, *amici* have a general interest in promoting clear principles for determining the precedential effect of this Court's decisions. In particular, each *amicus* is deeply interested in the scope of federal jurisdiction under the Clean Water Act and has participated in litigation and rulemaking addressing that issue over many years. In that area, uncertainty over the precedential effect of this Court's 4-1-4 decision in

Rapanos v. *United States*, 547 U.S. 715 (2006), has—it is no exaggeration to say—wreaked havoc in courts and agencies and among regulated communities. This Court's decision in *Marks* v. *United States*, 430 U.S. 188 (1977), has proved a murky standard for applying *Rapanos* and similarly divided decisions. As *amici* explain, a clearer set of principles for applying fractured decisions like *Rapanos* is readily available, would promote greater certainty, and would redirect party, judicial, and government resources from fruitless debates about how to apply *Marks* back to resolution of the underlying legal issues.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Court should take this opportunity to clarify the precedential effect of its decisions in which no rationale supporting the judgment enjoys majority support. This Court's guidance in *Marks* v. *United States*, 430 U.S. 188 (1977), has proved inadequate to the task. *Amici* illustrate the problem, and suggest its resolution, by examining one divided 4-1-4 decision that has proved especially problematic for *amici* and their members: *Rapanos* v. *United States*, 547 U.S. 715 (2006), which addressed the scope of federal authority under the Clean Water Act. By doing so, *amici* hope to illuminate the principles that should be applied in cases like these, whether it is with respect to *Rapanos*, or *Freeman* v. *United States*, 564 U.S. 522 (2011), or more generally.

Rapanos addressed the jurisdiction of the Environmental Protection Agency and the U.S. Army Corps of Engineers over the "waters of the United States," a term of art used in the Clean Water Act. While a majority of the Court agreed that the agencies had defined the "waters of the United States" too

broadly, the Justices divided regarding the appropriate test for defining those waters. Justice Scalia, writing for a plurality of four Justices, and Justice Kennedy, concurring separately, offered two very different tests, backed by two very different rationales. *Rapanos*, therefore, raises the same issue presented here: which, if any, of the opinions in a split decision is controlling.

The question of how *Rapanos* should be interpreted has been the subject of sustained controversy. In enacting their 2015 rule defining "waters of the United States," the Corps and the EPA relied heavily on Justice Kennedy's concurrence, as well as Justice Stevens's dissent. Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37,053, 37,061 (June 29, 2015). The President recently instructed the agencies to reconsider that rule and instead "consider interpreting the term 'navigable waters' * * * in a manner consistent with the opinion of Justice Antonin Scalia in *Rapanos*." Exec. Order No. 13,778, § 3, 82 Fed. Reg. 12,497 (Feb. 28, 2017). Pursuant to that instruction, the agencies have filed a notice of proposed rulemaking indicating that they will "consider developing a new definition of 'waters of the United States' taking into consideration the principles that Justice Scalia outlined in the *Rapanos* plurality opinion." Definition of "Waters of the United States"—Recodification of Pre-Existing Rules, 82 Fed. Reg. 34,899, 34,902 (July 27, 2017).

The Court's decision in this case is likely to clarify how lower courts and agencies should interpret not only *Freeman*, but other decisions like *Rapanos*. In the pages that follow, we offer some thoughts regarding how courts should approach that task, in light of *Marks* and of general principles of judicial

authority—and how they should determine the precedential effect of *Rapanos* in particular. Ultimately, we submit that any coherent approach to similarly divided decisions would recognize the following principles:

1. A concurring opinion is controlling if, and only if, it offers a rationale that a majority of the Court would accept, which was decidedly not the case in *Rapanos*. A concurring rationale that is entirely distinct from and incommensurate with that of the plurality opinion can never be deemed the decision's binding holding.

2. A decision's holding may never be constructed by looking to the rationale urged by dissenters.

3. Even though a plurality and a concurrence may disagree on the rationale for the judgment, they may agree as to particular examples of how their rationales would play out. Such points of agreement by a majority of Justices are entitled to considerable weight.

4. Where no rationale enjoys majority support, and where the rationale of one opinion forming the majority cannot properly be characterized as a logical subset of another (as in *Rapanos*), the holding of the case is limited to the judgment on the particular facts. In the Clean Water Act context, that result is not problematic. Prior precedent addressing the issue will be left in place—for example, *Solid Waste Agency of Northern Cook County* v. *United States Army Corps of Engineers*, 531 U.S. 159 (2001), and *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985), in the case of Clean Water Act jurisdiction. And the Court will have other opportunities to address the issue and potentially resolve its divi-

sions. That result is preferable to the endless disputes over how to apply *Marks* that have marred the development of Clean Water Act law after *Rapanos*.

ARGUMENT

The Fractured *Rapanos* Decision Offers A Case Study That Should Inform The Court's Approach In This Case.

What the Court says in this case about how to construe a divided 4-1-4 decision (or any decision in which a rationale explaining the judgment does not enjoy majority support) will necessarily shed light on how courts should interpret other similarly split decisions—including the Court's decision in *Rapanos*. Like the decision in *Freeman*, *Rapanos* consisted of a four-Justice plurality opinion, a single-Justice concurrence, and a four-Justice dissent. Neither the plurality opinion nor the concurrence can be described as a logical subset of the other.

Rapanos addressed two distinct questions regarding the jurisdiction of federal agencies to regulate "waters of the United States" under the Clean Water Act—immensely important questions, given that "[t]he burden of federal regulation on those who would deposit fill material in locations denominated 'waters of the United States' is not trivial," to say the least. 547 U.S. at 721 (plurality opinion). First, the Court considered whether the "waters of the United States" encompass any "channel or conduit—whether man-made or natural, broad or narrow, permanent or ephemeral—through which rainwater or drainage may occasionally or intermittently flow." *Id.* at 722. Second, the Court considered "whether a wetland may be considered 'adjacent to' remote 'waters of the

United States,' because of a mere hydrologic connection to them." *Id.* at 740.

Justice Scalia, writing for himself, the Chief Justice,[2] and Justices Thomas and Alito, answered both questions in the negative. As to the first question, Justice Scalia reasoned that the statutory phrase "waters of the United States" refers to "relatively permanent, standing or flowing bodies of water," not "ordinarily dry channels through which water occasionally or intermittently flows." 547 U.S. at 732-733. As to the second question, the plurality concluded that "*only* those wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right, so that there is no clear demarcation between 'waters' and wetlands, are 'adjacent to' such waters and covered by the Act." *Id.* at 742.

Justice Kennedy, writing for himself only, concurred in the judgment—but he applied a wholly distinct analytic framework to determine the scope of the "waters of the United States." To start, he concluded that the plurality's "first requirement" of "permanent standing water or continuous flow" made "little practical sense in a statute concerned with downstream water quality," and was not compelled by the statute's text. 547 U.S. at 769 (Kennedy, J., concurring in the judgment). Turning to the second question, he would hold that wetlands are sufficiently "adjacent" to "waters of the United States" if they

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[2] The Chief Justice also wrote separately to emphasize that "the Corps and the EPA would have enjoyed plenty of room to operate in developing *some* notion of an outer bound to the reach of their authority," but instead "chose to adhere to [their] essentially boundless view of the scope of [their] power." 547 U.S. at 758 (Roberts, C.J., concurring).

possess a "significant nexus" to those waters, meaning that they "significantly affect the[ir] chemical, physical, and biological integrity." *Id.* at 779-780.

Justice Stevens, writing for himself and Justices Souter, Ginsburg, and Breyer, dissented. The dissenters accused the plurality of relying on an "arbitrary distinction" between permanent and intermittent flows of water, reasoning that "[i]ntermittent streams can carry pollutants just as perennial streams can." 547 U.S. at 801, 804 (Stevens, J., dissenting). The dissent would have deferred to the conclusion of the Corps that wetlands are "adjacent" to "waters of the United States" if they possess a hydrologic connection to those waters. *Id.* at 805. For that reason, the dissenters also rejected Justice Kennedy's imposition of a "significant nexus" requirement. *Id.* at 807-809. Regardless, Justice Stevens noted that "all four Justices who have joined this opinion would uphold the Corps' jurisdiction * * * in all other cases in which either the plurality's or Justice Kennedy's test is satisfied." *Id.* at 810.

In sum, *Rapanos* presents the same general question at issue here: how a court may determine which, if any, of the distinct opinions in a split decision are controlling. *Amici* now offer their own understanding of how to determine the precedential effect (or lack thereof) of such decisions, using *Rapanos* as our example.

A. Justice Kennedy's concurrence in *Rapanos* is not controlling.

Marks is of limited import in determining the precedential effect of a divided decision like *Rapanos*. Indeed, it establishes a very narrow rule: Where a concurring opinion adopts a narrower variant of the

plurality's reasoning, the concurring opinion may be considered the opinion of the Court (and vice versa). Beyond this "Russian nesting doll" situation, *Marks* has no application. It does not permit a court to give precedential effect to a concurrence that is simply *different* from—*i.e.*, neither a narrower nor a broader version of the reasoning of—the plurality opinion.

1. In *Marks*, the Court considered whether its decision in *A Book Named "John Cleland's Memoirs of a Woman of Pleasure"* v. *Attorney General of Massachusetts* ("*Memoirs*"), 383 U.S. 413 (1966), had established the applicable obscenity standard at the time the petitioner trafficked in allegedly obscene materials. 430 U.S. at 193. The majority opinions in *Memoirs* comprised a three-Justice plurality opinion holding that obscenity must be "utterly without redeeming social value"; "broader" opinions by Justices Black and Douglas holding that "the First Amendment provides an absolute shield" against obscenity prosecutions; and a similarly broad opinion by Justice Stewart holding that "only 'hardcore pornography' may be suppressed." *Id.* at 193-194. Put simply, all six Justices in the majority agreed that alleged obscenity receives significant constitutional protection, while disagreeing on exactly how much protection to afford.

Marks held that the plurality opinion in *Memoirs* was controlling. 430 U.S. at 194. The Court reiterated that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'" *Id.* at 193 (quoting *Gregg* v. *Georgia*, 428 U.S. 153, 169 n.15 (1976) (plurality opinion)).

Because the plurality opinion would afford the least First Amendment protection to obscenity among the opinions concurring in the judgment, "[t]he view of the *Memoirs* plurality therefore constituted the holding of the Court and provided the governing standards." *Id.* at 194.

Marks sets forth the rule that "[w]hen there is no majority opinion, the *narrower* holding controls." *Panetti* v. *Quarterman*, 551 U.S. 930, 949 (2007) (emphasis added). And since *Marks*, the Court and individual justices have reasoned that *Marks* is inapplicable where one opinion is neither narrower nor broader than another. See, *e.g.*, *Glossip* v. *Gross*, 135 S. Ct. 2726, 2793 (2015) (Sotomayor, J., dissenting) (explaining that *Marks* was inapplicable where one opinion was "unrelated to, and thus not any broader or narrower than," the other); *Nichols* v. *United States*, 511 U.S. 738, 745 (1994) (declining to apply *Marks* where "[a] number of Courts of Appeals have decided that there is no lowest common denominator or 'narrowest grounds' that represents the Court's holding").

To serve as the narrower ground under *Marks*, an opinion "must represent a common denominator of the Court's *reasoning*; it must embody a position implicitly approved by at least five Justices who support the judgment." *King* v. *Palmer*, 950 F.2d 771, 781 (D.C. Cir. 1991) (en banc) (emphasis added). That is the case where, for example, "the concurrence posits a narrow test to which the plurality must necessarily agree as a logical consequence of its own, broader position." *Id.* at 782. Ultimately, "[a] fractured Supreme Court decision should only bind the federal courts of appeal when a majority of the Justices agree upon a single underlying rationale and

one opinion can reasonably be described as a logical subset of the other." *United States* v. *Davis*, 825 F.3d 1014, 1021-1022 (9th Cir. 2016) (en banc). Accord *United States* v. *Alcan Aluminum Corp.*, 315 F.3d 179, 189 (2d Cir. 2003); *Homeward Bound, Inc.* v. *Hissom Mem'l Ctr.*, 963 F.2d 1352, 1359 (10th Cir. 1992).

Conversely, there is *no* controlling opinion if "the plurality and concurring opinions do not share common reasoning whereby one analysis is a 'logical subset'" of the other. *United States* v. *Epps*, 707 F.3d 337, 350 (D.C. Cir. 2013) (quoting *King*, 950 F.2d at 781). "Where no standard put forth in a concurring opinion is a logical subset of another concurring opinion (or opinions) that, together, would equal five votes, *Marks* breaks down." *United States* v. *Cundiff*, 555 F.3d 200, 209 (6th Cir. 2009). Thus, "[w]hen no single rationale commands a majority of the Court, only the specific result is binding on lower federal courts." *Davis*, 825 F.3d at 1022.

Some courts of appeals, like the decision below, have taken a different approach, holding instead that an opinion is controlling if it "necessarily produce[s] *results* with which a majority of the Court from that case would agree," regardless of whether its *reasoning* overlaps in any meaningful way with the other opinions. Pet. App. 12a. But that approach would "turn a single opinion that lacks majority support into national law" (*King*, 950 F.2d at 782)—yielding the anomalous result that "the views of one justice, with whom no one concurs," represents "the law of the land." *Dague* v. *City of Burlington*, 935 F.2d 1343, 1360 (2d Cir. 1991). That is an untenable rule on its face. Instead, the Court should hold that an opinion is only controlling under *Marks* if it contains

reasoning with which a majority of the Court necessarily agreed.

2. In *Rapanos*, neither the plurality opinion nor Justice Kennedy's concurring opinion can reasonably be described as a "logical subset" of the other. Thus neither is controlling under *Marks*. See Pet. Br. 50.

As courts of appeals have repeatedly explained, in *Rapanos*, "neither the plurality's test nor Justice Kennedy's can be viewed as relying on narrower grounds than the other." *United States* v. *Donovan*, 661 F.3d 174, 182 (3d Cir. 2011). That is because "[t]he cases in which Justice Kennedy would limit federal jurisdiction are not a subset of the cases in which the plurality would limit jurisdiction," or vice versa. *United States* v. *Johnson*, 467 F.3d 56, 64 (1st Cir. 2006). Accord *United States* v. *Freedman Farms, Inc.*, 786 F. Supp. 2d 1016, 1018-1019 (E.D.N.C. 2011) ("neither the plurality opinion nor the concurring opinion is a precise subset of the other"); *United States* v. *Donovan*, 2010 WL 3000058, at *3 (D. Del. July 23, 2010) ("no single opinion in *Rapanos* is a logical subset of any other opinion"). "Because there is little overlap between the plurality's and Justice Kennedy's opinions, it is difficult"—indeed, a self-defeating exercise—to try to "determine which holding is the narrowest." *United States* v. *Bailey*, 571 F.3d 791, 798 (8th Cir. 2009).

Underlining that the Justices' approaches were starkly different, each opinion "flatly reject[s] the other's view." *Cundiff*, 555 F.3d at 210. Justice Scalia contended that Justice Kennedy's opinion "leaves the Act's 'text' and 'structure' virtually unaddressed"—effectively "rewrit[ing] the statute, using for that purpose the gimmick of 'significant nexus.'" *Rapanos*, 547 U.S. at 753, 756 (plurality opinion). Justice Ken-

nedy responded that the plurality opinion "impose[s] two limitations * * * without support in the language and purposes of the Act or in our cases interpreting it." *Id.* at 768 (Kennedy, J., concurring in the judgment). As the Chief Justice put it, "no opinion commands a majority of the Court on precisely how to read Congress' limits on the reach of the Clean Water Act," and "[l]ower courts and regulated entities will now have to feel their way on a case-by-case basis." *Id.* at 758 (Roberts, C.J., concurring).

Commentators have likewise concluded that Justice Kennedy's concurring opinion "lays out a framework far different from that offered by the plurality," and is therefore not a "logical subset" of the plurality's reasoning. G.W. Jones, Note, *Federal Wetlands Jurisdiction—The Quagmire of* Rapanos *v.* Un.ted States, 2 Pitt. J. Envtl. Pub. Health L. 79, 88 (2008). See also Jamison E. Colburn, *Governing the Gradient: Clarity and Discretion at the Water's Edge*, 62 Vill. L. Rev. 81, 91 (2017) ("Justice Kennedy's theory of the CWA's text, purpose, and doctrinal record differed substantially from the plurality's theory in this regard"). Justice Kennedy's opinion, therefore, cannot be designated the controlling opinion under *Marks*.[3]

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[3] See also, *e.g.*, Joseph M. Cacace, Note, *Plurality Decisions in the Supreme Court of the United States: A Reexamination of the* Marks *Doctrine After* Rapanos *v.* United States, 41 Suffolk U. L. Rev. 97, 121 (2007) ("the putative narrowest-grounds opinion 'does not fit entirely within a broader circle drawn by the' plurality") (quoting *King*, 950 F.2d at 782); Roni A. Elias, *More than a Rivulet Running to It: Making Sense of the Clean Water Act Jurisdiction After* Rapanos *v.* United States, 10 Appalachian Nat. Resources L.J. 29, 51 (2016) ("there is no significant commonality among any of the opinions in *Rapanos*"); Justin F. Marceau, *Plurality Decisions: Upward Flowing Precedent and*

Of course, several circuits have held that Justice Kennedy's opinion does "provid[e] the controlling rule of law" in *Rapanos*, even though the plurality expressly rejected its reasoning, which is logically distinct from the plurality's. See, *e.g.*, *Northern Cal. River Watch* v. *City of Healdsburg*, 496 F.3d 993, 999-1000 (9th Cir. 2007). But those courts have wrongly concluded that an opinion may be deemed controlling under *Marks* even if it contains reasoning that none of the other Justices concurring in the judgment would adopt. Indeed, some of those courts have treated Justice Kennedy's opinion as controlling, even while acknowledging that in some cases it would yield a result *opposed* by eight Justices. See *United States* v. *Gerke Excavating, Inc.*, 464 F.3d 723, 724-725 (7th Cir. 2006). That result is plainly not authorized by *Marks*.

Nor does it make sense to say that Justice Kennedy's opinion is the "narrowest' because it is "least restrictive of the assertion of federal authority," given that "it seems just as plausible to conclude that the narrowest ground of decision in *Rapanos* is the ground most restrictive of government authority." *Johnson*, 467 F.3d at 63.

Acoustic Separation, 45 Conn. L. Rev. 933, 981 (2013) ("the Court's decisions that apply *Marks* suggest that there is no precedent"); Kristen M. Sopet, *Environmental Law/Administrative Law*—United States *v.* Rapanos*: Justice Stevens's Suggestion May Not Be the Yellow Brick Road, but It Is the Best Pathway to Oz*, 31 W. New Eng. L. Rev. 879, 908 (2009) ("[T]he *Marks* test will not yield an intelligible result when applied to *Rapanos*."); Ryan J. Williams, *Questioning* Marks*: Plurality Decisions and Precedential Constraint*, 69 Stan. L. Rev. 795, 812 (2017) ("the jurisdictional test [Justice Kennedy] endorsed was not wholly subsumed within the plurality's test").

Thus, neither Justice Scalia's plurality opinion nor Justice Kennedy's concurring opinion, in isolation, can be deemed to set forth the holding of *Rapanos*.

B. Justice Stevens's dissenting opinion in *Rapanos* is not entitled to any weight.

Whatever weight is due to *concurring* opinions, courts should not give any weight to *dissenting* opinions, which necessarily do not support the Court's judgment. As the Court put it in *O'Dell* v. *Netherland*, 521 U.S. 151 (1997), *Marks* requires the court to identify "the narrowest grounds of decision among the Justices *whose votes were necessary to the judgment*." *Id.* at 160 (emphasis added). In *Rapanos*, that means that Justice Stevens's dissenting opinion cannot be deemed to set forth any controlling rules of law.

The Court in *Marks* "instruct[ed] lower courts * * * to ignore dissents." *Cundiff*, 555 F.3d at 208. As explained above, the Court held that "the holding of the Court may be viewed as that position taken by *those Members who concurred in the judgments* on the narrowest grounds"—*i.e.*, not those who expressly dissented from those judgments. *Marks*, 430 U.S. at 193 (emphasis added). Thus, "[t]he plain wording of *Marks* does not contemplate considering the position of dissenting Justices." *Freedman Farms, Inc.*, 786 F. Supp. 2d at 1021. See Marceau, 45 Conn. L. Rev. at 959 n.121 (counting the votes of dissenting Justices is "inconsistent with the plain language of the *Marks* formula").

The Court has repeatedly emphasized this limitation on the scope of the *Marks* rule. See, *e.g.*, *O'Dell*, 521 U.S. at 160; *Romano* v. *Oklahoma*, 512

U.S. 1, 9 (1994) (explaining that because "Justice O'Connor *supplied the fifth vote* in *Caldwell*, and concurred on grounds narrower than those put forth by the plurality, her position is controlling") (emphasis added). The votes of dissenting justices are, by definition, not necessary to the judgment, and therefore do not count under *Marks*.

In this respect, statements in dissenting opinions are similar to dicta. After all, "like dicta, statements in dissenting opinions are neither 'necessary to' nor even supportive of the judgment." Williams, 69 Stan. L. Rev. at 852. Treating them as more would change the nature of dissents, in which dissenters now "enjoy something of the liberty of a gadfly, as the outcome does not in fact depend on what they say." *United States* v. *Duvall*, 740 F.3d 604, 623 (D.C. Cir. 2013) (Williams, J., concurring in denial of en banc review). See also Ruth Bader Ginsburg, *The Role of Dissenting Opinions*, 95 Minn. L. Rev. 1, 6 (2010) (acknowledging that the purpose of a dissent may be to "attract immediate public attention and, thereby, to propel legislative change").

For these reasons, the courts of appeals have held that "*Marks* does *not* direct lower courts interpreting fractured Supreme Court decisions to consider the positions of those who dissented." *United States* v. *Robison*, 505 F.3d 1208, 1221 (11th Cir. 2007). See also Pet. App. 7a (following *Robison*); *United States* v. *Robertson*, 875 F.3d 1281, 1292 (9th Cir. 2017) ("the dissent that did not support the judgment is out"); *Gibson* v. *American Cyanamid Co.*, 760 F.3d 600, 620 (7th Cir. 2014) ("under *Marks*, the positions of those Justices who *dissented* from the judgment are not counted in trying to discern a governing holding from divided opinions"). A court simp-

ly may not "combine a dissent with a concurrence to form a *Marks* majority." *Palmer*, 950 F.2d at 783.

Because nothing in Justice Stevens's dissent in *Rapanos* "constitutes a portion of the judgment of the Court, * * * nothing in the dissent is part of the actual holding of the case." Jonathan H. Adler, *Reckoning with* Rapanos*: Revisiting "Waters of the United States" and the Limits of Federal Wetland Regulation*, 14 Mo. Envtl. L. & Pol'y Rev. 1, 14 (2006). A court may not give any controlling effect to the *Rapanos* dissent under *Marks*.

C. Courts should give weight to those conclusions shared by the plurality and concurring opinion in *Rapanos*.

Having cleared the brush, the question remains: What should a court do where neither of the opinions which make up the majority supporting the judgment is a logical subset of the other, obviating *Marks*? There are a number of options, each of which gives appropriate weight to the opinions rendered by the Court.

First, a court can apply *both* opinions to ascertain how a majority of the Justices would resolve the case at hand. If both opinions would arrive at the same result, then there is no need to determine which opinion is controlling. Application of that approach to *Rapanos* would require a court to apply the plurality's test and Justice Kennedy's "significant nexus" test, and find jurisdiction (or a lack thereof) if both would reach the same conclusion.

Second, a court can look for express points of agreement between the two opinions, and afford controlling weight to how a majority of the Justices would resolve specific issues. Application of that ap-

proach to *Rapanos* would yield a number of clear propositions of law that would assist a court (or agency) in assessing whether jurisdiction is present.

Third, it may be the case that *none* of the opinions in a split decision, or any parts of them, are controlling. In that case, the court—or the agency—should carefully consider each of the opinions rendered by the majority as persuasive authority. Application of that approach to *Rapanos* would require considering the plurality opinion and Justice Kennedy's concurrence as persuasive authority, in light of the cases that preceded *Rapanos* in which there were clear majority holdings, including *SWANCC* and *Riverside Bayview*.

We lay out each of these approaches in turn.

1. Applying both opinions.

The first option is the most straightforward: A court may apply *both* the plurality and the concurrence to ascertain how they would resolve the issue at hand. "Any result that would have been reached under every one of the judgment-supportive rationales constitutes a result that the lower court itself is similarly bound to reach in the later case." Williams, 69 Stan. L. Rev. at 803. Moreover, applying both opinions where they would yield convergent results allows the court to avoid resolving the often difficult question of which opinion is controlling or what rationale constitutes the holding of the case.

That was the approach of the Sixth Circuit in *Cundiff*, which held that "jurisdiction [was] proper * * * under each of the primary *Rapanos* opinions," and therefore declined to "decide here, once and for all, which test controls in all future cases." 555 F.3d at 208. Similarly, the Fifth Circuit in *United States*

v. *Lucas*, 516 F.3d 316, 327 (5th Cir. 2008), upheld a conviction under the Clean Water Act because "the evidence presented at trial supports all three of the *Rapanos* standards," meaning that the Court did not need to decide which opinion was controlling.

Under this approach, a court would require that Clean Water Act jurisdictional rules satisfy *both* the plurality opinion and Justice Kennedy's concurring opinion, because that is the narrowest "position" taken by the majority opinions, read together. *Rapanos* would therefore require that jurisdictional waters have a relatively permanent flow that reaches traditional navigable waters, that wetlands have a continuous surface connection to navigable waters, *and* that the flow or connection is sufficient in frequency, duration, and proximity to affect the chemical, physical, and biological integrity of covered waters to satisfy Justice Kennedy's significant nexus test.

In contrast, if under both opinions the relevant jurisdictional hook is *not* present, then five Justices would necessarily conclude that they do not fall within the Act. Thus, this approach serves to isolate comparatively "easy" cases where both the plurality and the concurrence would reach the same result.

2. Finding points of agreement.

Alternatively, the court may look for specific points of agreement between the plurality and concurring opinions—*i.e.*, "common ground shared by five or more Justices." *Tyler* v. *Bethlehem Steel Corp.*, 958 F.2d 1176, 1182 (2d Cir. 1992). This approach will usually yield some guidance, because "[o]nly in very rare cases do the opinions making up a majority of a court contain no common principles or common ground on which to derive any precedential holding

of the court." *FTC* v. *Whole Foods Mkt., Inc.*, 548 F.3d 1028, 1061 n.8 (D.C. Cir. 2008). See also Mark Alan Thurmon, *When the Court Divides: Reconsidering the Precedential Value of Supreme Court Plurality Decisions*, 42 Duke L.J. 419, 452-453 (1992) ("many decisions will contain majority agreement on some points and lack that level of consensus on other issues"). Even absent common ground as to the rationale employed, there may be agreement as to the result the Justices' disparate rationales would reach as to specific facts. That is the case with *Rapanos*.

The plurality opinion and Justice Kennedy's concurring opinion contain multiple points of agreement as to which types of features are jurisdictional and which are not. A subsequent court (or agency) faced with the question of jurisdiction over one of those features should be bound by that agreement of a majority of Justices, or at least give that agreement considerable weight. See Adler, 14 Mo. Envtl. L. & Pol'y Rev. at 11 (under this approach, "the grounds of agreement between Justice Kennedy and the plurality opinion authored by Justice Scalia, form the holding of the Court").

For example, the plurality and Justice Kennedy agreed that "the word 'navigable' in 'navigable waters' [must] be given some importance." *Rapanos*, 547 U.S. at 778 (Kennedy, J., concurring in the judgment). See *id.* at 731 (plurality opinion). They also agreed that the Clean Water Act "encompasses some waters not navigable in the traditional sense," but that have a substantial connection to navigable waters. *Duarte Nursery, Inc.* v. *United States Army Corps of Engineers*, 2017 WL 1105993, at *5 (E.D. Cal. Mar. 24, 2017). Of course, they disagreed whether the sufficient connection is "a continuous

surface connection," requiring a "relatively permanent standing or continuously flowing bod[y] of water (*Rapanos*, 547 U.S. at 739, 742 (plurality opinion)), or instead a "nexus" that is "significant" enough to "affect the chemical, physical, and biological integrity" of the navigable water (*id.* at 779-780 (Kennedy, J., concurring in the judgment)).

Despite this difference in characterizing the necessary connection, both Justice Kennedy and the plurality agreed that, applying their tests, "waters of the United States" do *not* include "drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water volumes toward it," much less the waters or "wetlands [that] lie alongside [such] a ditch or drain." 547 U.S. at 778, 781 (Kennedy, J., concurring in the judgment). See *id.* at 778-781 (identifying "volume of flow" and "proximity" as relevant factors and ruling out jurisdiction over features with a "remote," "insubstantial," or "speculative effect on navigable waters); *id.* at 733-734 (plurality opinion) (jurisdiction reaches "continuously present, fixed bodies of water"; "intermittent or ephemeral flow" of the sort found in "drainage ditches," "storm sewers and culverts," and "dry arroyos" is insufficient); *id.* at 742 (wetlands with "an intermittent, physically remote hydrologic connection" to jurisdictional waters lack a "significant nexus").

Under this common-denominator approach, those are points of law on which five Justices are necessarily in agreement—and therefore bind lower courts and agencies. But further issues as to which five Justices did not agree remain open for decision.

3. Treating all of the majority opinions as persuasive authority.

A third option is to hold that neither the plurality nor the concurring opinion in a split decision is controlling, and each serves as persuasive authority that courts may use in resolving similar questions in the future. This approach recognizes that "Court precedent should form only when a single rule of decision has the express support of at least five justices." Richard M. Re, *Beyond the* Marks *Rule* 1 (UCLA Sch. of Law, Pub. Law Research Paper No. 17-50, 2018), perma.cc/2ZJ3-T945. And it also has the advantage of allowing lower courts "to experiment with alternative rules and outcomes," which may assist the Court in resolving the issue that gave rise to the split in the first place. Ken Kimura, *A Legitimacy Model for the Interpretation of Plurality Decisions*, 77 Cornell L. Rev. 1593, 1625 (1992).

Under this approach, a court would not treat any opinion or combination of opinions as controlling and would instead use the Justices' writings in *Rapanos* as persuasive authority to be considered in determining the scope of jurisdiction under the Clean Water Act. Importantly, those merely persuasive opinions would need to be read through the lens of earlier decisions addressing Clean Water Act jurisdiction that do have clear holdings, such as *SWANCC* and *Riverside Bayview*. In no circumstance would it be permissible to read statements in any of the *Rapanos* opinions as having superseded the authoritative rulings in those earlier cases. At least one court has taken this approach. *United States* v. *Chevron Pipe Line Co.*, 437 F. Supp. 2d 605, 615 (N.D. Tex. 2006).

By relying on all of the non-dissenting opinions in *Rapanos*, the court or agency would also give

weight to the balance of interests that Congress considered in enacting the Clean Water Act. Justice Scalia's plurality opinion "comports with the text because it gives effect to the long-standing and well-established meanings of the crucial terms 'navigable waters' and 'waters of the United States," while also reflecting "[f]oundational principles of federalism." Elias, 10 Appalachian Nat. Resources L.J. at 57-58. Justice Kennedy's opinion recognizes the "[i]mportant public interests * * * served by the Clean Water Act in general and by the protection of wetlands in particular." *Rapanos*, 547 U.S. at 777. These opinions therefore serve as a useful guide to future questions of jurisdiction under the Clean Water Act, even if neither is controlling.

Ultimately, however, what a court cannot do is allow the opinion of one Justice, lacking support from a majority of the Court, to make national law. Any of the options discussed above would be far more consistent with *Marks*—and give appropriate weight to all of the Court's prior opinions.

D. Other common law jurisdictions agree with the approaches we have proposed.

The principles we describe above have been recognized in other common law jurisdictions in which separate opinions in support of a majority judgment have been the norm and the search for the *ratio decidendi* of a case across disparate opinions a more commonplace endeavor. See generally J.L. Montrose, *Ratio Decidendi and the House of Lords*, 20 Mod. L. Rev. 124, 127-130 (1957).

In those jurisdictions, dissenting decisions are afforded no weight in determining the holding of a fractured decision. As Professor Anthony Honore ex-

plained, "[t]he fundamental reason why the opinions of minority judges cannot form part of the *ratio decidendi* of a case is that they are not reasons for the order made by the court: a *ratio decidendi* is entitled to authority not as the opinion of one or more judges, but as the reason for a judicial order." A.M. Honore, *Ratio Decidendi: Judges and Court*, 71 Law Q. Rev. 196, 198 (1955). See, *e.g.*, *Federation Ins. Ltd.* v. *Wasson* [1987] HCA 34 (Austl.) ("it would not be proper to seek to extract a binding authority from an opinion expressed in a dissenting judgment"); *Garcia* v. *National Austl. Bank Ltd.* [1998] HCA 48 (Austl.) (a Justice of the Australian High Court "cannot speak for the Court unless his reasoning attracts the support, express or implied, of a majority of the participating Justices (disregarding for this purpose any who did not agree with the order of the Court disposing of the proceedings on the point in question")) (Kirby, J.).

And courts in those jurisdictions do not recognize opinions in which no rationale shares majority support as authoritative precedent beyond the particulars of the judgment. Thus, when the members of the U.K. House of Lords expressed different opinions about the meaning of a statute, "the decision in the House of Lords does not give us authoritative guidance." *Walsh* v. *Curry* [1955] NI 112, 125 (Black, L.J.) (N. Ir.) (addressing the divided decision of the three-justice majority in *George Wimpey & Co.* v. *British Overseas Airways Corp.* [1955] AC 169). In those circumstances, a subsequent "court is in a position to form its own judgment on the matter." *Id.* at 124 (MacDermott, L.C.J.). See also, *e.g.*, *Harper* v. *National Coal Bd.* [1974] QB 614, 621-622 (Denning, L.J.) (concluding that when a majority of the House of Lords divided 2-1 as to their rationale, "we cannot

say that any of the three in the majority was correct"); *Fellner* v. *Minister of the Interior* 1954 (4) SA 523 (App. Div.) (S. Afr.) ("there is no *ratio decidendi* of [a five judge] court unless at least three judges propound the same *ratio decidendi*"); *Perara-Cathcart* v. *The Queen* [2017] HCA 6 (Austl.) ("aggregation of the reasons for decision of members of the majority can sometimes fail to yield a ratio decidendi") (Gageler, J.); *Great W. Ry. Co.* v. *Owners of the S.S. Mostyn* [1928] AC 57, 73 (U.K.) ("if from the opinions delivered it is clear * * * what the ratio decidendi was which led to the judgment," it "is binding. But if it is not clear, then I do not think it is part of the tribunal's duty to spell out with great difficulty a ratio decidendi in order to be bound by it") (Dunedin, L.J.).[4]

As with *Rapanos*, when there is a divided majority that does not fit the "Russian dolls" situation covered by *Marks*, a court should treat the case "as one which had no discernible *ratio* and regar[d] itself as free to follow * * * earlier decisions." Rupert Cross & J.W. Harris, Precedent in English Law 92 (4th ed. 1991).

* * *

Under these principles, neither the plurality opinion nor Justice Sotomayor's concurring opinion in *Freeman*, 564 U.S. 522, should be deemed to con-

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[4] The *Marks* rule too has an analogue in English common law. See, *e.g.*, *Gold* v. *Essex County Council* [1942] 2 KB 293, 298 (Greene, L.J.) (where "two members of the court base their judgments, the one on a narrow ground * * * and the other on wide propositions * * *, and the third member of the court expresses his concurrence in the reasoning of both, I think it right to treat the narrow ground as the real ratio decidendi").

trol in this case. Neither opinion is a "logical subset" of the other; as the Chief Justice explained, "[t]he plurality and the opinion concurring in the judgment agree on very little except the judgment." *Id.* at 544 (Roberts, C.J., dissenting). Thus, the court of appeals erred in holding that Justice Sotomayor's concurrence states the holding of *Freeman*. Pet. App. 2a-3a. The Court should instead adopt the approach we have described using *Rapanos* as a parallel example, and hold that both opinions are entitled to considerable weight to the extent they would yield the same result or agree on discrete legal issues, and should otherwise be treated as persuasive authority only.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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No. 17-155

IN THE

Supreme Court of the United States

ERIK LINDSEY HUGHES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF *AMICUS CURIAE* PROFESSOR DOUGLAS A. BERMAN IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF *AMICUS CURIAE*	1
SUMMARY OF THE ARGUMENT	1
ARGUMENT	3
I. SECTION 3582(c)(2) DEMONSTRATES THAT CONGRESS PRIORITIZES SUBSTANTIVE SENTENCING CONCERNS OVER FINALITY WITH RESPECT TO FEDERAL PRISON SENTENCES	3
II. SENTENCE-MODIFICATION PROCEEDINGS PROMOTE SENTENCING FITNESS AND FAIRNESS IN THE FEDERAL CRIMINAL JUSTICE SYSTEM	5
A. The Passage Of Time, Though Often Justifying A Stronger Commitment To The Finality Of A *Conviction*, Can Sometimes Justify Modifications Of A *Sentence*	6
B. Sentence-Modification Proceedings Comport With And Enhance The Government's Legitimate Penological Interests	8
C. Sentence-Modification Proceedings Foster Respect For The Criminal Justice System	10
D. Sentence-Modification Proceedings Can Save Long-Term Institutional Costs Associated With Incarceration	11

TABLE OF CONTENTS—continued

Page

III. THE STATUTORY TERM "BASED ON" SHOULD BE INTERPRETED BROADLY TO ACCOMPLISH CONGRESS' REASONABLE GOALS 13

IV. PETITIONER IS ELIGIBLE FOR A SENTENCE MODIFICATION 15

CONCLUSION 17

TABLE OF AUTHORITIES

CASES Page

Barber v. *Thomas*, 560 U.S. 474 (2010)..... 9
Brecht v. *Abrahamson*, 507 U.S. 619 (1993)..... 3
Dillon v. *United States*, 560 U.S. 817 (2010)..... *passim*
Dorsey v. *United States*, 567 U.S. 260 (2012)..... 5, 10, 14
Engle v. *Isaac*, 456 U.S. 107 (1982)..... 8
Freeman v. *United States*, 564 U.S. 522 (2011)..... *passim*
Graham v. *Florida*, 560 U.S. 48 (2010)..... 10
Kimbrough v. *United States*, 552 U.S. 85 (2007)..... 8
Koon v. *United States*, 518 U.S. 81 (1996) ... 7, 14
Mackey v. *United States*, 401 U.S. 667 (1971)..... 7, 10, 15
McCleskey v. *Zant*, 499 U.S. 467 (1991)..... 6
Miller v. *Alabama*, 567 U.S. 460 (2012)..... 9
Pepper v. *United States*, 562 U.S. 476 (2011)..... 8, 10
Peugh v. *United States*, 569 U.S. 530 (2013)..... 14
Tapia v. *United States*, 564 U.S. 319 (2011)..... 9
Teague v. *Lane*, 489 U.S. 288 (1989)..... 10
Trop v. *Dulles*, 356 U.S. 86 (1958)..... 8
United States v. *Bass*, 404 U.S. 336 (1971).. 14
United States v. *Booker*, 543 U.S. 220 (2005)..... 1
United States v. *Brown*, 556 F.3d 1108 (10th Cir. 2009)..... 12
United States v. *Figueroa*, 714 F.3d 757 (2d Cir. 2013)..... 12

TABLE OF AUTHORITIES—continued

Page

United States v. *Frady*, 456 U.S. 152 (1982) 3, 10
United States v. *Harris*, 568 F.3d 666 (8th Cir. 2009) 12
United States v. *Howard*, 644 F.3d 455 (6th Cir. 2011) 12
United States v. *Legree*, 205 F.3d 724 (4th Cir. 2000) 12
United States v. *Lightfoot*, 626 F.3d 1092 (9th Cir. 2010) 12
United States v. *Marion*, 404 U.S. 307 (1971) 6
United States v. *Reddick*, 53 F.3d 462 (2d Cir. 1995) 12
United States v. *Webb*, 565 F.3d 789 (11th Cir. 2009) 12
United States v. *Whitebird*, 55 F.3d 1007 (5th Cir. 1995) 12

STATUTES AND REGULATION

Sentencing Reform Act of 1984, Pub. L. No. 98-473, ch. II, 98 Stat. 1987 5
Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372 8
18 U.S.C. § 3553(a)(2)(C),.(D) 7
§ 3582 ..... *passim*
28 U.S.C. § 991 5
§ 994 5
Annual Determination of Average Cost of Incarceration, 81 Fed. Reg. 46,957 (July 19, 2016) 11

LEGISLATIVE HISTORY

S. Rep. No. 98-225 (1983) 3, 5

TABLE OF AUTHORITIES—continued

Page

RULE

Fed. R. Crim. P. 35(b)(1) 4

SCHOLARLY AUTHORITIES

Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441 (1963)..... 9

Douglas A. Berman, *Re-Balancing Fitness, Fairness, and Finality for Sentences*, Wake Forest J.L. & Pol'y 151 (2014)..... 1

Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527 (1947)..... 13

Andrew Chongseh Kim, *Beyond Finality: How Making Criminal Judgments Less Final Can Further the "Interests of Finality"*, 2013 Utah L. Rev. 561..... 11

Kevin R. Reitz, *Demographic Impact Statements, O'Connor's Warning, and the Mysteries of Prison Release: Topics from a Sentencing Reform Agenda*, 61 Fla. L. Rev. 683 (2009)..... 15

Sarah French Russell, *Reluctance to Resentence: Courts, Congress, and Collateral Review*, 91 N.C. L. Rev. 79 (2012)..... 11

OTHER AUTHORITIES

USSG § 6B1.2(c)..... 15

USSG supp. app. C, amend. 782..... 8

INTEREST OF *AMICUS CURIAE*[1]

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SUMMARY OF THE ARGUMENT

The standard presumption in favor of finality for criminal judgments need not and should not be elevated over other critical criminal justice interests when a defendant seeks only to modify an ongoing prison sentence based on new legal developments. See Douglas A. Berman, *Re-Balancing Fitness, Fairness, and Finality for Sentences*, 4 Wake Forest J.L. & Pol'y 151, 174–75 (2014). Through sentence-modification provisions like the one at issue in this case, see 18 U.S.C. § 3582(c)(2), Congress has expressed its concerns for those other criminal justice

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[1] The parties have granted consent to the filing of this brief. Under Supreme Court Rule 37.6, *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no person other than *amicus curiae* and its counsel made any monetary contribution intended to fund the preparation and submission of this brief.

interests by creating a significant sentencing exception to the usual presumption in favor of finality. Appreciating the importance of getting sentences right while an offender is still serving a prison term, Congress has astutely elevated substantive sentencing goals like accuracy, fairness, and uniformity over concerns about finality in this context. Section 3582(c)(2) serves well the purposes of fitness and fairness: its sentence-modification provisions eliminate unwarranted disparities in federal sentencing, promote the government's legitimate substantive penological interests, foster societal respect for the criminal justice system, and save long-term costs associated with excessive terms of incarceration.

The question of statutory interpretation presented in this case, *i.e.*, what does the term "based on" mean, should be resolved in favor of clear congressional policy and purpose. Defendants who commit crimes of similar severity under similar conditions should receive similar sentences. When it is functionally apparent that a particular amended guideline was applicable in a defendant's case, it ought not matter whether that defendant's plea agreement contained calculations applying the since-reduced guideline. A contrary interpretation, one that unnecessarily narrows eligibility for relief under § 3582(c)(2), would turn congressional policy on its head, wrongly elevate finality interests over those Congress sought to champion, and lead to systemic injustice. The Court should take this opportunity to embrace a broad interpretation of "based on" that comports with overriding congressional policy. Accordingly, petitioner should be eligible for relief under § 3582(c)(2) because his sentence was "based on" a Guidelines range that has been subsequently lowered.

ARGUMENT

I. SECTION 3582(c)(2) DEMONSTRATES THAT CONGRESS PRIORITIZES SUBSTANTIVE SENTENCING CONCERNS OVER FINALITY WITH RESPECT TO FEDERAL PRISON SENTENCES.

Ordinarily, when direct appellate review comes to a close, "a presumption of finality and legality attaches to [a criminal] conviction and sentence." See *Brecht* v. *Abrahamson*, 507 U.S. 619, 633 (1993) (citing *Barefoot* v. *Estelle*, 463 U.S. 880, 887 (1983)). That general rule applies equally to federal and state criminal judgments. 18 U.S.C. § 3582(b); see *United States* v. *Frady*, 456 U.S. 152, 166 (1982) ("The Federal Government, no less than the States, has an interest in the finality of its criminal judgments.").

But Congress can decide how much weight should be given to finality interests for federal convictions and sentences. It has, in a handful of scenarios, therefore specifically prioritized other substantive concerns over finality interests for certain federal criminal sentences. As this Court recognized in *Dillon* v. *United States*, 560 U.S. 817 (2010), "Section 3582(c)(2) establishes an exception to the general rule of finality." *Id.* at 824; see S. Rep. No. 98-225, at 121 (1983) ("The approach taken [in this subsection] keeps the sentencing power in the judiciary where it belongs, yet permits later review of sentences in particularly compelling situations.").

Under § 3582(c)(2), "a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission" may move for a sentence reduction. If that eligibility requirement is satisfied, the district court then has discretion to "reduce the

term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission." 18 U.S.C. § 3582(c)(2); see also *Freeman* v. *United States*, 564 U.S. 522, 526 (2011) (plurality opinion) ("[T]he rule of finality is subject to a few narrow exceptions," including "a statutory provision enacted to permit defendants whose Guidelines sentencing range has been lowered by retroactive amendment to move for a sentence reduction if the terms of the statute are met.").

The statute establishes a two-step inquiry. First, the district court must determine whether a prisoner is eligible for a sentence modification and, if so, the extent of the reduction authorized. See *Dillon*, 560 U.S. at 827. At step two of the inquiry, the district court considers the § 3553(a) sentencing factors to determine whether, in its discretion, the particular defendant is fit for a sentence reduction. *Id.*

Two additional provisions reversing the presumption in favor of finality are also contained in § 3582(c). First, on a motion by the Director of the Bureau of Prisons, a district court may reduce a term of imprisonment "if it finds that . . . extraordinary and compelling reasons warrant such a reduction" or "the defendant is at least 70 years of age, has served at least 30 years in prison, . . . is not a danger to the safety of any other person or the community, . . . and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission." See 18 U.S.C. § 3582(c)(1)(A). Second, a district court may "modify an imposed term of imprisonment to the extent otherwise expressly permitted by statute or by Rule 35 of the Federal Rules of Criminal Procedure." *Id.* § 3582(c)(1)(B); see Fed. R. Crim. P.

35(b)(1) ("Upon the government's motion made within one year of sentencing, the court may reduce a sentence if the defendant, after sentencing, provided substantial assistance in investigating or prosecuting another person.").

II. SENTENCE-MODIFICATION PROCEEDINGS PROMOTE SENTENCING FITNESS AND FAIRNESS IN THE FEDERAL CRIMINAL JUSTICE SYSTEM.

The Sentencing Reform Act of 1984 ("SRA"), Pub. L. No. 98-473, ch. II, 98 Stat. 1987, was intended to "increase transparency, uniformity, and proportionality" in federal sentencing. *Dorsey* v. *United States*, 567 U.S. 260, 265 (2012). Accordingly, Congress established "an independent commission in the judicial branch" for purposes of "establish[ing] sentencing policies and practices" that provide "certainty," promote "fairness," and avoid "unwarranted sentencing disparities." 28 U.S.C. § 991. The United States Sentencing Commission was, for like reasons, instructed to promulgate uniform Sentencing Guidelines and instructional policy statements. *Id.* § 994(a). The Commission was further directed to periodically "review and revise" the Guidelines, see *id.* § 994(o), and, at certain other intervals, "promulgate" and submit "amendments" to Congress, see *id.* § 994(p). The SRA's "comprehensive sentencing scheme" ensures, in one way or another, that "those who commit crimes of similar severity under similar conditions receive similar sentences." *Freeman*, 564 U.S. at 533 (plurality opinion).

Section 3582(c)(2) likewise reflects a broad congressional concern for fairness in federal sentencing. According to the relevant Senate Report, the SRA's sentence-modification provisions were considered vital "safety valves." S. Rep. No. 98-225, at 121. The value

of provisions like § 3582(c)(2), the Senate Report explained, was to "assure the availability of specific review and reduction of a term of imprisonment for 'extraordinary and compelling reasons' and to respond to changes in the Guidelines." *Id.* As the Senate Report suggested, society's interest in finality necessarily recedes "if there is a major downward adjustment in the Guidelines because of change in the community view of the offense." See *id.* at 180. By allowing prisoners to seek modification of their ongoing imprisonment based on significant new legal or social developments, Congress has elevated substantive sentencing goals like accuracy, fairness, and uniformity over concerns about finality. See *Dillon*, 560 U.S. at 828 ("[Section] 3582(c)(2) represents a congressional act of lenity intended to give prisoners the benefit of later enacted adjustments to the judgments reflected in the Guidelines."). Members of this Court therefore have, for good reason, described § 3582(c)(2) as a mechanism designed to "remedy systemic injustice." See *Freeman*, 564 U.S. at 534 (plurality opinion).

A. The Passage Of Time, Though Often Justifying A Stronger Commitment To The Finality Of A *Conviction*, Can Sometimes Justify Modifications Of A *Sentence*.

Ordinarily, the passage of time and the staleness that accompanies it counsel against upsetting an otherwise final criminal conviction: "Passage of time, whether before or after arrest, may impair memories, cause evidence to be lost, [or] deprive the [parties] of witnesses . . . ." *United States* v. *Marion*, 404 U.S. 307, 321 (1971). For this reason, this Court has been wary of collateral attacks on convictions that would necessitate a new trial requiring the resolution of historical factual issues. See *McCleskey* v. *Zant*, 499 U.S.

467, 491 (1991) ("[W]hen a habeas petitioner succeeds in obtaining a new trial, the erosion of memory and dispersion of witnesses that occur with the passage of time prejudice the government and diminish the chances of a reliable criminal adjudication." (citation omitted)).

But sentencing proceedings, unlike criminal trials, include discretionary forward-looking determinations that may actually become better informed with the passage of time. See, *e.g.*, 18 U.S.C. § 3553(a)(2)(C), (D) (requiring sentencing judges to consider at sentencing the need "to protect the public from further crimes of the defendant" and "to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner"). Sentencing calls for reasoned judgment, which balances an array of diverse considerations to impose, going forward, a just and effective punishment. See *Koon* v. *United States*, 518 U.S. 81, 113 (1996) ("It has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue.").

Thus, in the sentencing context, the passage of time provides an opportunity for societal perspectives on just and effective punishment to evolve, and can in turn enhance the information the sentencing judge utilizes in a particular case.[2] *Cf. Mackey* v. *United*

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[2] In fact, this Court has recently explained, in the analogous context of post-appeal resentencings, how "evidence of [a defendant's] rehabilitation since his initial sentencing is clearly relevant to the selection of an appropriate sentence" because this information "provides the most up-to-date picture of [his]

States, 401 U.S. 667, 693 (1971) (Harlan, J., concurring in judgments in part and dissenting in part) (discussing the ability of "time and growth in social capacity" to change our understanding of what is necessary to "vitiate the fairness" of a criminal judgment); *Trop* v. *Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion) (discussing, in the Eighth Amendment context, "the evolving standards of decency that mark the progress of a maturing society"). Indeed, a sharp and telling modern example of the passage of time altering societal perspectives on just and effective punishment is the changing attitudes toward severe prison sentences imposed on certain non-violent drug offenders. See generally *Kimbrough* v. *United States*, 552 U.S. 85, 94–100 (2007) (discussing the historical treatment of crack and powder cocaine under the federal sentencing laws); see also, *e.g.*, Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372 (increasing the drug amounts triggering mandatory minimum sentences for crack-trafficking offenses); USSG supp. app. C, amend. 782 (effective Nov. 2014) (reducing the Sentencing Guidelines' offense levels for drug offenses).

B. Sentence-Modification Proceedings Comport With And Enhance The Government's Legitimate Penological Interests.

There is often concern in federal habeas corpus proceedings that collateral review of convictions can "cost society the right to punish admitted offenders" and "may reward the accused with complete freedom from prosecution." See *Engle* v. *Isaac*, 456 U.S. 107, 127–28 (1982). But those concerns vanish where, as

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'history and characteristics.'" *Pepper* v. *United States*, 562 U.S. 476, 491–92 (2011) (quoting 18 U.S.C. § 3553(a)(1)).

here, a prisoner is merely seeking modification of his current prison sentence. As this Court has previously observed, 18 U.S.C. § 3582(c)(2) "authorize[s] only a limited adjustment to an otherwise final sentence and not a plenary resentencing proceeding." *Dillon*, 560 U.S. at 826. If the prisoner is eligible for relief, only then may the district court re-evaluate the sentencing factors set forth in § 3553(a) and discretionarily decide whether to bestow the "benefit of later enacted adjustments to the judgments reflected in the Guidelines." *Id.* at 828.

By ensuring a given sentence is properly calibrated through this process, sentence modifications can actually further deterrence and other penological goals. See Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441, 452 (1963) ("[I]t is essential to the educational and deterrent functions of the criminal law that we be able to say that one violating that law will swiftly and certainly become subject to . . . *just punishment*." (emphasis added)). Further, sentence-modification proceedings, as designed by Congress, do not detract from the government's interests in incapacitation and retribution. No legitimate penological purpose is served by imposing an unduly harsh sentence. *Cf. Miller* v. *Alabama*, 567 U.S. 460, 477–78 (2012) ("[O]ur individualized sentencing cases . . . teach that in imposing a [society's] harshest penalties, a sentencer misses too much if he treats every child as an adult. . . . This mandatory punishment disregards the possibility of rehabilitation even when the circumstances most suggest it.");[3] *Barber* v.

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[3] This Court in *Tapia* v. *United States*, 564 U.S. 319 (2011), held that "a [sentencing] court may not impose or lengthen a prison sentence to enable an offender to complete a treatment program or otherwise to promote rehabilitation." *Id.* at 335. But

Thomas, 560 U.S. 474, 504 (2010) (Kennedy, J., dissenting) ("To a prisoner, time behind bars is . . . something real, even terrifying."); *Graham* v. *Florida*, 560 U.S. 48, 73 (2010) ("Incapacitation cannot override all other considerations, lest the Eighth Amendment's rule against disproportionate sentences be a nullity.").

C. Sentence-Modification Proceedings Foster Respect For The Criminal Justice System.

Members of this Court have noted how society's interest in the "finality of criminal judgments" may conflict with a prisoner's interest in "substantial justice." Compare *Frady*, 456 U.S. at 175, with *id.* at 186 (Brennan, J., dissenting). Proponents of finality maintain that it is "essential to the operation of our criminal justice system." See *Teague* v. *Lane*, 489 U.S. 288, 309 (1989) (plurality opinion); *Mackey*, 401 U.S. at 691 (Harlan, J., concurring in judgments in part and dissenting in part) ("No one . . . is benefited by a judgment providing a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation on issues already resolved.").

But sentence-modification proceedings can actually foster respect for the criminal justice system. Transparency dispels concerns that sentences vary arbitrarily and, further, facilitates the evaluation of the merits of particular policies. See *Dorsey*, 567 U.S. at 265 (recognizing that the SRA "sought to increase transparency" in federal sentencing). Scholars have

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nothing precludes a sentencing court from imposing a shorter sentence or reducing a defendant's sentence post-appeal or at the second, discretionary step of a § 3582(c)(2) proceeding based on a defendant's rehabilitation. *See Pepper*, 562 U.S. at 490–91.

highlighted various ways that undue emphasis on finality concerns over other substantive sentencing goals can harmfully undermine society's perception of the criminal justice system as both fair and legitimate. See Sarah French Russell, *Reluctance to Resentence: Courts, Congress, and Collateral Review*, 91 N.C. L. Rev. 79, 161 (2012) ("Allowing people to continue to serve years of extra prison time despite a plain error in their sentence undermines the legitimacy of the criminal justice system—particularly when some racial or ethnic groups are disproportionally impacted by lengthy federal sentences and recidivist enhancements."); see also Andrew Chongseh Kim, *Beyond Finality: How Making Criminal Judgments Less Final Can Further the "Interests of Finality"*, 2013 Utah L. Rev. 561, 589 ("[S]tudies have shown that compliance with the law in everyday life is motivated primarily by an internalized sense that obeying the law is the right thing to do, even when doing so is inconvenient.").

D. Sentence-Modification Proceedings Can Save Long-Term Institutional Costs Associated With Incarceration.

When a court determines that a sentence can and should be reduced under § 3582(c)(2), the federal fisc benefits because the government no longer needs to pay for a period of incarceration that a judge has decided is no longer just and effective. It costs, on average, approximately $32,000 per year for the federal government to incarcerate an individual. See Annual Determination of Average Cost of Incarceration, 81 Fed. Reg. 46,957, 46,957 (July 19, 2016). There is no sound fiscal reason for federal taxpayers to continue paying for a prison sentence based on Guideline provisions that the U.S. Sentencing Commission has decided to revise and that a federal judge has decided

no longer serves an essential penological purpose for a particular defendant.

Nor need this Court be too concerned with increased litigation costs if § 3582(c)(2) eligibility were expanded. As noted earlier, a § 3582(c)(2) proceeding is "not a plenary resentencing proceeding." *Dillon*, 560 U.S. at 826. Circuit courts have held that defendants seeking § 3582(c)(2) relief have no right to counsel[4] and no right to an in-court hearing.[5] To this end, the record relating to petitioner's sentence-reduction request is typically discrete: the defendant files a

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[4] *See United States* v. *Webb*, 565 F.3d 789, 795 (11th Cir. 2009) (per curiam) ("[T]here is no statutory or constitutional right to counsel for a § 3582(c) motion or hearing . . . ."); *compare also United States* v. *Harris*, 568 F.3d 666, 669 (8th Cir. 2009) (per curiam) (holding that § 3582(c)(2) movants have no statutory right to counsel because § 3582(c) motions are not "ancillary matters" within the ambit of the Criminal Justice Act (18 U.S.C. § 3006A(c)), *United States* v. *Reddick*, 53 F.3d 462, 464–65 (2d Cir. 1995) (same), *and Webb*, 565 F.3d at 795 (same), *with United States* v. *Whitebird*, 55 F.3d 1007, 1011 (5th Cir. 1995) (finding no Sixth Amendment right to counsel in connection with § 3582(c)(2) motions because "the constitutional right to counsel extends only through the defendant's first appeal"), *United States* v. *Legree*, 205 F.3d 724, 730 (4th Cir. 2000) (same), *and United States* v. *Brown*, 556 F.3d 1108, 1113 (10th Cir. 2009) (same).

[5] *See United States* v. *Lightfoot*, 626 F.3d 1092, 1096 n.13 (9th Cir. 2010) ("[T]he law does not require the district court to allow" a § 3582(c)(2) movant "to put in a personal appearance."); *see also, e.g.*, *United States* v. *Figueroa*, 714 F.3d 757, 760–61 (2d Cir. 2013) (per curiam) ("[a] defendant need not be present" when "[t]he proceeding involves the correction of a sentence under Rule 35 or 18 U.S.C. § 3582(c)" (quoting Fed. R. Crim. P. 43(b)(4)); *United States* v. *Howard*, 644 F.3d 455, 458–59 (6th Cir. 2011) (no abuse of discretion where district court did not hold a § 3582(c)(2) hearing because Federal Rule of Criminal Procedure 43(b)(4) provides no right of allocution).

written motion (often *pro se*), the government files a written response, and the court issues its ruling.

The unnecessary additional costs of prolonged incarceration and the absence of signigicant offsetting litigation costs from expanding § 3582(c)(2) eligibility provides still further justifications for eschewing any interpretations of § 3582(c)(2) eligibility that unnecessarily limit its sound reach.

III. THE STATUTORY TERM "BASED ON" SHOULD BE INTERPRETED BROADLY TO ACCOMPLISH CONGRESS' REASONABLE GOALS.

Under 18 U.S.C. § 3582(c)(2), "a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission" may be eligible for a sentence reduction. The question of statutory interpretation presented in this case, as in *Freeman*, concerns the term "based on"—that is, whether a sentence imposed pursuant to a binding Federal Rule of Criminal Procedure 11(c)(1)(C) plea agreement is "based on" the plea agreement, the Sentencing Guidelines, or some combination of both.

In light of the SRA's creation of the § 3582(c)(2) remedy and overarching goals of prioritizing fairness, transparency, and uniformity over finality in connection with federal sentencing, the term "based on" should be interpreted broadly, as the *Freeman* plurality advocated. As Justice Frankfurter once commented, "the purpose which a court must effectuate is not that which Congress should have enacted, or would have. It is that which it did enact, however inaptly, because it may fairly be said to be imbedded in the statute." Felix Frankfurter, *Some Reflections on the*

Reading of Statutes, 47 Colum. L. Rev. 527, 539 (1947).

The SRA is not shrouded in mystery. To the contrary, this Court has consistently recognized that the Act was intended to address the problem of "significant sentencing disparities among similarly situated offenders." See *Peugh* v. *United States*, 569 U.S. 530, 535 (2013); see also *Dorsey*, 567 U.S. at 265 (recognizing that the SRA was designed to "increase transparency, uniformity, and proportionality" in federal sentencing); *Freeman*, 564 U.S. at 525 (plurality opinion) (recognizing that the SRA "calls for the creation of Sentencing Guidelines to inform judicial discretion in order to reduce unwarranted disparities in federal sentencing." (citation omitted)); *Koon*, 518 U.S. at 113 ("The goal of the Sentencing Guidelines is, of course, to reduce unjustified disparities and so reach toward the evenhandedness and neutrality that are the distinguishing marks of any principled system of justice.").

With this understanding of the congressional purpose behind the SRA, there is no reason to limit eligibility for a sentence reduction to an arbitrary subset of defendants based on an overly rigid reading of the simple term "based on." Indeed, any perceived ambiguity in the interpretation of the phrase "based on a sentencing range," see 18 U.S.C. § 3582(c)(2), should be resolved in favor of the defendant and congressional purposes. See *United States* v. *Bass*, 404 U.S. 336, 347–50 (1971) ("[W]here there is ambiguity in a criminal statute, doubts are resolved in favor of the defendant.").

A contrary rule that limits eligibility for sentence reductions would unduly fossilize societal views on punishment in a manner obviously contrary to congressional goals. As one leading commentator has put

it, undue limits on the review of sentences risk "lock[ing] in the worst of our sentencing mistakes." See Kevin R. Reitz, *Demographic Impact Statements, O'Connor's Warning, and the Mysteries of Prison Release: Topics from a Sentencing Reform Agenda*, 61 Fla. L. Rev. 683, 706 (2009). The need to recalibrate the sentences of an obsolete era are particularly appropriate where those sentences resulted in severe and lengthy periods of confinement. Lengthy sentences can fail to stand the test of time, as "growth in social capacity" changes our understanding of what is necessary to "vitiate the fairness" of a criminal sentence. *Cf. Mackey*, 401 U.S. at 693 (Harlan, J., concurring in judgments in part and dissenting in part); see also *Freeman*, 564 U.S. at 533 (plurality opinion) ("[T]he Commission determined that those Guidelines were flawed, and therefore that sentences that relied on them ought to be reexamined."). At bottom, a narrow interpretation of the statute at issue risks turning congressional purposes on its head and transforming the federal sentencing scheme into a "cause of inequality, not a bulwark against it." *Freeman*, 564 U.S. at 525 (plurality opinion).

IV. PETITIONER IS ELIGIBLE FOR A SENTENCE MODIFICATION.

Under a proper interpretation of § 3582(c)(2), petitioner's sentence was "based on" the Sentencing Guidelines. He should therefore be deemed eligible to receive a sentence modification.

As petitioner has explained (Br. at 35–37), the record demonstrates that "[t]he Guidelines were considered throughout [his] plea bargaining and sentencing process." Consistent with the command of USSG § 6B1.2(c) (forbidding the judge from accepting a Rule 11(c)(1)(C) agreement without first giving due consideration to the applicable Guidelines sentencing

range), the parties agreed that the court "will be required to consider" the Guidelines before imposing petitioner's sentence and that the court "has the discretion to depart from those Guidelines." Pet. App. 54a. Similarly, the parties agreed that petitioner's sentencing would involve an "application of the Sentencing Guidelines."[6] *Id.* at 56a.

That is, in fact, what occurred. The Probation Office prepared a presentence investigation report recommending Guidelines calculations to the court. The court expressly "reviewed" that report, its addendum, "the sentencing guidelines," and the parties "comments and objections" to the report. Pet. App. 32a–33a. The court then resolved a dispute over the calculation of petitioner's Guidelines range and expressly calculated petitioner's "total Offense level," "Criminal History Category," and "Custody guideline range." *Id.* at 33a–36a. And in imposing petitioner's sentence, the court expressly decreed that the sentence was "compatible with the advisory United States Sentencing Guidelines." *Id.* at 47a; see also *id.* at 33a (the court remarking that the parties' sentencing stipulation in the plea agreement "complies . . . with the spirit of the advisory United States Sentencing Guidelines.").

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[6] It does not matter, as the district court erroneously found, that petitioner's plea agreement did not contain Guidelines calculations itself. Pet. App. 28a. The district court was required to consider the Guidelines in determining whether to accept the parties' plea agreement and impose their stipulated sentence. Moreover, the absence of Guidelines calculations in petitioner's plea agreement does not mean that the parties reached their sentencing stipulation without considering the Guidelines either. As petitioner has accurately explained, Department of Justice policy requires prosecutors to consider them when negotiating a disposition—no less in Rule 11(c)(1)(C) cases than any other. Pet. Br. 24.

CONCLUSION

For these reasons, the court of appeals' decision should be reversed.

Respectfully submitted,

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January 29, 2018

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No. 17-155

IN THE

Supreme Court of the United States

ERIK LINDSEY HUGHES,

Petitioner,

v.

UNITED STATES,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

MOTION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF AND BRIEF OF LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF NEITHER PARTY

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MOTION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE

Pursuant to this Court's Rule 37.3(b), the law professor *Amici* listed in the Appendix to the *Brief of Law Professors as Amici Curiae in Support of Neither Party* respectfully request leave of the Court to file this *Amici Curiae* Brief. Both parties were notified in a timely manner of the intent of these *Amici* to file the attached Brief as required by Rule 37.3(b). Written consent to the filing of this Brief has been granted by counsel for the Petitioners. Counsel for Respondent did not respond to *Amici*'s request for consent, necessitating the filing of this Motion.

This case presents a challenge to the operation of the narrowest grounds doctrine. *Amici* are law professors whose areas of specialization include a wide range of bodies of Supreme Court case law, including in areas that have produced non-majority opinions. *Amici* have an interest in ensuring the proper application of the narrowest grounds rule, and they submit this Brief to clarify the doctrine's scope and application, including identifying the specific conditions under which the premises of the doctrine do, and do not, apply.

Accordingly, *Amici* respectfully request that the Court grant the Motion for leave to file this *Amici Curiae* Brief.

Respectfully submitted,

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TABLE OF CONTENTS

Page(s)

INTEREST OF *AMICI* 1

SUMMARY OF ARGUMENT 1

ARGUMENT 5

I: *Freeman v. United States* is not Among the Rare Cases in which the Premise of *Marks* Fails to Hold 5

A. *Marks* requires that opinions in non-majority cases align along a single dimension 7

Table 1: *Memoirs v. Massachusetts* in One Dimension 11

B. The Marks Premise Fails when Opinions Do Not Align Along One Dimension 16

Table 2: *Kassel v. Consolidated* Frightways in Two Dimensions 18

C. The Eleventh Circuit Correctly Applied *Marks* to *Freeman* 20

D. Abandoning *Marks* Would Compromise Norms that Motivate Forming Majority Supreme Court Opinions 26

TABLE OF CONTENTS
(Continued)

II. FURTHER ARGUMENTS AGAINST RECOGNIZING JUSTICE SOTOMAYOR'S OPINION AS CONTROLLING UNDER *MARKS* ARE UNPERSUASIVE 31

A. Despite strong disagreement with Justice Sotomayor's opinion, *Freeman* is not a Case of Ambiguous Dimensionality 31

B. The *Epps* Hypotheticals Implicate the Holding-*Dictum* Distinction, not the Application of *Marks* to *Freeman* 36

CONCLUSION 41

APPENDIX: TABLE OF CONTENTS

Page(s)

APPENDIX.....A-1

TABLE OF AUTHORITIES

Page(s)

CASES

Adarand Constructors v. Pena, 515 U.S. 200 (1995).....26, 27, 28, 29

Freeman v. United States, 564 U.S. 522 (2011).....passim

Ginzburg v. United States, 383 U.S. 463 (1966)..... 10

Gregg v. Georgia, 428 U.S. 153 (1976)..... 6

Grutter v. Bollinger, 539 U.S. 306 (2003)..... 27

Hanover 3201 Realty v. Village Supermarkets, Inc., 806 F.3d 162 (3d Cir. 2015).....18, 33

Kassel v. Consolidated Freightways, 450 U.S. 662 (1981).....16, 31

Marks v. United States, 430 U.S. 188 (1977).....passim

McDonald v. City of Chicago, 561 U.S. 742 (2010)..... 6

Memoirs v. Massachusetts, 383 U.S. 413 (1966).....passim

Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990).....26, 28

Miller v. California, 413 U.S. 15 (1973).....5, 6, 7, 8

TABLE OF AUTHORITIES
(Continued)

National Mutual Insurance Co. v. Tidewater Transfer Co., 337 U.S. 582 (1949) 6

Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989) 33

Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992) 12

Regents of the University of California v. Bakke, 438 U.S. 265 (1978) 12

Roe v. Wade, 410 U.S. 113 (1973) 12

Roth v. United States, 354 U.S. 476 (1957) 5, 8

Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996) 33

United States v. Davis, 825 F.3d 1014 (9th Cir. 2016) 4, 35

United States v. Epps, 707 F.3d 337 (D.C. Cir. 2013) 4, 35, 36

United States v. Gerke Excavating, 464 F.3d 723 (7th Cir. 2006) 15

United States v. Hughes, 849 F.3d 1008 (11th Cir. 2017) 23

Washington v. Glucksberg, 521 U.S. 702 (1997) 28

TABLE OF AUTHORITIES
(Continued)

STATUTES

18 U.S.C. § 3582(c)(2) 20, 37

ARTICLES

Abramowicz & Stearns, *Defining Dicta*, 57 STAN. L. REV. 953 (2005) 39

Re, *Beyond the Marks Rule* (Dec. 19, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstr–act_id=3090620 ..... 15, 28

Rogers, *"I Vote This Way Because I'm Wrong": The Supreme Court Justice as Epimenides*, 79 KY. L. REV. 439 (1990-91) 33

SAARI, DISPOSING DICTATORS, DEMYSTIFYING VOTING PARADOXES: SOCIAL CHOICE ANALYSIS (2008) 9, 19

STEARNS, CONSTITUTIONAL PROCESS: A SOCIAL CHOICE ANALYSIS OF SUPREME COURT DECISION MAKING (2000) 7, 19

Stearns, *How Outcome Voting Promotes Principled Issue Identification: A Reply to John Roger and Others*, 49 VAND. L. REV. 1045 (1996) 7

TABLE OF AUTHORITIES
(Continued)

Stearns, Obergefell, Fisher, *and the Inversion of Tiers*, 19 U. PA. J. CONST. L. 1043 (2017) 9

Stearns, *Should Justices Ever Switch Votes?:* Miller v. Albright *in Social Choice Perspective*, 7 S. CT. ECON. REV. 87 (1999) 7

Stearns, *The Case for Including* Marks v. United States *in the Canon of Constitutional Law*, 17 CONST. COMMENT. 321 (2000) 7

Stearns, *The Misguided Renaissance of Social Choice*, 103 YALE L.J. 1219 (1994) 12

Williams, *Questioning* Marks*: Plurality Decisions and Precedential Constraint*, 69 STAN. L. REV. 795 (2017) 6, 15

Young, *Condorcet's Theory of Voting*, 82 AM. POL. SCI. REV. 1231 (1963) 12

INTEREST OF *AMICI*

Amici's Counsel of Record[1] is a Professor of Law at the University of Maryland Carey School of Law. He specializes in *Constitutional Law* and *Law and Economics*. Over the past twenty-five years, he has written extensively on, among other topics, the narrowest grounds doctrine. His published books and articles include works focused on the doctrine or treating it as part of a larger descriptive analysis of the Supreme Court's role in judicial administration. *Amici*, listed in the Appendix, are ten Professors of Law from nine law schools. They hold broad expertise in Constitutional Law, Federal Courts, Administrative Law, and other fields, and each is interested in the proper application of the narrowest grounds rule.

SUMMARY OF ARGUMENT

Petitioner claims that the narrowest grounds doctrine, articulated in *Marks v. United States*, 430 U.S. 188 (1977), cannot be applied in *Freeman v. United States*, 564 U.S. 522 (2011). *Freeman* controlled the outcome of Mr. Hughes's case before the United States Court of Appeals for the Eleventh Circuit. Sustaining petitioner's claim requires that *Freeman* fall within a small class of non-majority Supreme Court cases in which the premise of the narrowest

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[1] No counsel for a party authored this Brief in whole or in part. No party or party's counsel financially supported this Brief, and no one other than *Amici* and their counsel financially contributed to this Brief.

grounds doctrine fails to apply. Petitioner's claim is mistaken. Petitioner's argument rests on a flawed premise that, when exposed, reveals that *Marks* applies to *Freeman* in a straightforward manner.

Abandoning *Marks* would create two major problems. First, it would create considerable guidance problems for lower courts; and second, it would undermine norms within this Court that motivate the successful formation of majority opinions. Abandoning *Marks* would have consequences beyond non-majority cases.

The small category of non-majority Supreme Court cases to which the narrowest grounds rule fails to apply possesses specific and identifiable features. *Freeman* lacks those features and does not fall within that category. *Freeman* falls within the larger category of conventional non-majority cases to which *Marks* easily applies. The three *Freeman* opinions align on a normative dimension, from a broad to narrow willingness to reconsider a sentence imposed pursuant to a plea when part of the relevant Federal Sentencing Guidelines was later retroactively reduced. Along that dimension, Justice Kennedy's plurality opinion provides the broadest basis for relief, allowing a blanket right to reconsideration; Justice Sotomayor's concurrence in the judgment provides an intermediate basis for relief, allowing reconsideration only in a specified class of cases, including Mr. Freeman but not Mr. Hughes; and the Chief Justice's opinion provides no basis for relief, embracing a contrary blanket prohibition on reconsideration, denying relief to both Freeman and Hughes. Under *Marks*, the opinion consistent with the judgment decided on narrowest grounds expresses the holding.

Justice Sotomayor's opinion, which provides the narrowest basis for granting relief to Freeman along the identified dimension, satisfies this test.

The premise of *Marks* fails to hold only when the opinions within a non-majority case cannot be expressed along a single dimension, instead implicating two dimensions.[2] When this occurs, opposite resolutions of the controlling case issues support the judgment, whereas a partially favorable issue resolution to each opinion supporting the judgment results in dissent. For example, in a non-majority case in which a plurality of four denies standing but would grant relief on the merits; a single concurrence in the judgment grants standing but denies relief on the merits; and the dissent for four would grant standing and would provide relief on the merits, five justices deny relief despite separate majorities supporting standing and relief on the merits. Neither opinion consistent with the judgment states the holding on narrower grounds; the plurality is narrower on the question of standing; and the concurrence in the judgment is narrower on the merits. When this occurs, majority resolutions of controlling case issues lead to the dissenting result. Because such cases implicate two normative dimensions, each essential to the judgment, the *Marks* premise fails to hold.

Marks applies in typical non-majority Supreme Court cases because most cases, including *Freeman*, implicate one dimension. This includes non-majority cases with multiple issues.

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[2] The holds true regardless of the substantive body of law.

Lower courts and legal scholars have characterized the intuition underlying the narrowest grounds rule in various ways. Characterizations include embedded reasoning, logical subset, lowest common denominator, and even nested Russian dolls. Each is consistent with recognizing the dimensionality of non-majority cases. Although dimensionality analysis reaches the same outcome in every case in which these methods apply, dimensionality provides additional analytical tools for identifying the small subset of non-majority cases in which the *Marks* premise fails to hold. That category excludes *Freeman*.

Abandoning *Marks* in favor of Petitioner's proposed alternatives would undermine lower court guidance and norms motivating majority decisions in this Court. The implications of *Marks* extend beyond cases to which the doctrine formally applies.

Freeman is not a case of ambiguous dimensionality. The hypotheticals described in *United States v. Epps*, 707 F.3d 337, 348–51 (D.C. Cir. 2013), and *United States v. Davis*, 825 F.3d 1014, 1023–24 (9th Cir. 2016) (en banc), on which Petitioner relies, are not inconsistent with recognizing that Justice Sotomayor's *Freeman* concurrence in the judgment controls under *Marks*. Instead, the hypotheticals implicate the distinction between holding and *dictum*.

Amici do not address the merits of *Hughes*. Because the *Marks* doctrine applies only to lower courts, not the Supreme Court, this Court may resolve *Hughes* as it pleases without reconsidering, or abandoning, *Marks*.

ARGUMENT

I: *Freeman v. United States* is not Among the Rare Cases in which the Premise of *Marks* Fails to Hold

In *Marks v. United States*, 430 U.S. 188 (1977), the Court addressed the following question: Does a criminal defendant have a due process right to rely upon a stringent prosecutorial standard on which he based his course of conduct, announced in a plurality decision, *Memoirs v. Massachusetts*, 383 U.S. 413 (1966), rather than the subsequently relaxed prosecutorial standard set out in the majority opinion, *Miller v. California*, 413 U.S. 15 (1973), where *Miller* effectively reinstated the pre-*Memoirs* majority opinion standard set out in *Roth v. United States*, 354 U.S. 476 (1957)?

Marks is the obverse case of *Freeman* and *Hughes*. The latter offenders sought the benefit of a subsequent favorable legal change, a reduction in part of the Federal Sentencing Guidelines; Marks sought to *avoid* the retroactive application of a subsequently unfavorable legal change, a lowered prosecutorial standard.

Marks is critical to *Hughes* in several respects. First, the case history clarifies that although *Marks* binds lower courts, the Supreme Court only gives precedential status to its majority decisions. Second, the narrowest grounds rule is based on earlier practice. Although that practice was not universally fol-

lowed,[3] this Court recognized it before *Marks*. *See Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976) (opinion of Stewart, Powell, and Stevens, JJ.).

The *Marks* Court's expression of the narrowest ground doctrine has generated some confusion in lower courts. The statement itself is unobjectionable. The study of collective decision making reveals an inevitable subset of non-majority cases in which the premise of *Marks* fails to hold. When this occurs, the narrowest grounds doctrine cannot be successfully applied.[4] Such cases have generated scholarly proposals to abandon *Marks*. Doing so would create considerable guidance problems in lower courts respecting non-majority cases, and would undermine norms within this Court respecting the formation of majority opinions. The narrowest grounds rule illustrates Voltaire's admonition that "Perfect is the enemy of good." Susan Ratcliffe, *Concise Oxford Dictionary of Quotations* 389 (2011). *Marks* is a good rule in a con-

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[3] *See, e.g., Marks v. United States*, 430 U.S. 188, 189 n.1 (1977). The *Marks* Court reviewed lower court decisions choosing whether to apply the obscenity standard announced in *Miller v. California*, 413 U.S. 15 (1973), or *Memoirs v. Massachusetts*, 383 U.S. 413 (1966), but assumed, along with lower courts, that the controlling *Memoirs* opinion was the plurality.

[4] Not all such cases create practical difficulties. Some non-majority cases in which *Marks* fails to apply require only a binary determination on the application of a rule. *See* Ryan C. Williams, *Questioning* Marks*: Plurality Decisions and Precedential Constraint*, 69 STAN. L. REV. 795, 831–35 (2017) (illustrating with *McDonald v. City of Chicago*, 561 U.S. 742 (2010), and *National Mutual Insurance Co. v. Tidewater Transfer Co.*, 337 U.S. 582 (1949)).

text in which no rule can be perfect. Displacing *Marks* invites far greater problems than those remaining with *Marks* in place.

A. *Marks* requires that opinions in non-majority cases align along a single dimension

The *Marks* petitioners were convicted of distributing obscene materials pursuant to jury instructions modeled on *Miller v. California*, 413 U.S. 15 (1973), a case decided after the underlying criminal activity, and subsequent to *Memoirs v. Massachusetts*, 383 U.S. 413 (1966).[5] *Memoirs* had announced a stricter prosecutorial standard by which petitioners claimed to have charted their course of conduct. The district court based the jury instruction on the *Miller* standard, and the Sixth Circuit affirmed the conviction.

The *Marks* petitioners maintained that applying the retroactively relaxed *Miller* standard, premised on contemporary community standards, violated their due process right to rely upon the stricter nar-

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[5] For more detailed presentations, see Maxwell L. Stearns, *The Case for Including* Marks v. United States *in the Canon of Constitutional Law*, 17 CONST. COMMENT. 321 (2000); MAXWELL L. STEARNS, CONSTITUTIONAL PROCESS: A SOCIAL CHOICE ANALYSIS OF SUPREME COURT DECISION MAKING 124–29 (2000); Maxwell L. Stearns, *Should Justices Ever Switch Votes?:* Miller v. Albright *in Social Choice Perspective*, 7 SUP. CT. ECON. REV. 87, 111–17 (1999); Maxwell L. Stearns, *How Outcome Voting Promotes Principled Issue Identification: A Reply to John Roger and Others*, 49 VAND. L. REV. 1045 (1996).

rowest grounds holding in *Memoirs*. The *Memoirs* plurality raised the prosecutorial threshold, relative to *Roth v. United States*, 354 U.S. 476 (1957), to "utterly without redeeming social value." *Memoirs*, 383 U.S. at 418. As Justice Powell explained in *Marks*, the *Miller* Court described the *Memoirs* obscenity standard as all but impossible for prosecutors to meet. *Marks*, 430 U.S. at 194 (citing *Miller*, 413 U.S. at 22)).

Unlike *Roth* and *Miller*, *Memoirs* was a non-majority opinion, consisting of a plurality, two concurrences in the judgment, and several dissents. Together, *Miller* and *Marks* reveal two central insights. First, the *Miller* majority declined to give *Memoirs* precedential status, rejecting the plurality's test on its merits. This is consistent with the principle that the Supreme Court only affords its majority decisions precedential status. Second, in *Marks*, the Supreme Court instructed that lower courts are bound by non-majority Supreme Court decisions, rejecting the Sixth Circuit claim that, like the Supreme Court, it need only treat majority Supreme Court decisions as precedents. Because *Memoirs* did not command majority support, a split Sixth Circuit panel determined that "*Memoirs* never became the law." *Marks*, 430 U.S. at 192. Justice Powell explained that on such reasoning, the *Marks* issue was whether *Miller* significantly altered the *Roth* standard, which it did not.

Justice Powell stated:

> [W]e think the basic premise for this line of reasoning is faulty. When a fragmented Court de-

> cides a case and no single rationale explaining the result enjoys the assent of five Justices, "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds. . . ." *Marks*, 430 U.S. at 193 (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976) (opinion of Stewart, Powell, and Stevens, JJ.)).

Marks not only established that lower courts must afford precedential status to its non-majority decisions. It further instructed lower courts on how to identify the controlling opinion in such cases.

The analysis requires expressing the *Memoirs* opinions along a normative dimension. This helps identify the limiting case category to which the *Marks* premise fails to hold. A "dimension" is a normative measure used to assess virtually anything one wishes to compare.[6]

Justices Black and Douglas separately took the most protective view, expressing their "well-known position that the First Amendment provides an abso-

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[6] *See* Maxwell L. Stearns, Obergefell, Fisher, *and the Inversion of Tiers*, 19 U. PA. J. CONST. L. 1043, 1067-1106 (2017) (relating dimensionality to tiers of scrutiny); DONALD G. SAARI, DISPOSING DICTATORS, DEMYSTIFYING VOTING PARADOXES: SOCIAL CHOICE ANALYSIS 13–14 (2008) (relating dimensions to "cycling," defined as intransitive collective preferences).

lute shield against governmental action aimed at suppressing obscenity." *Marks*, 430 U.S. at 188 (citing *Memoirs*, 383 U.S. at 421, 424 (Black, Douglas, JJ., concurring in the judgment)). For ease of exposition, Justice Stewart is included in a three-Justice camp, A/B, with those concurring in the judgments.[7] Justice Brennan, for a plurality of three, set out the "utterly without redeeming social value" test. Finally, Justices Clark, White, and Harlan dissented, with Justices Clark and White adhering to the *Roth* holding, and Justice Harlan reasserting his view, expressed in *Roth*, that only hard-core pornography may be prosecuted federally, with state obscenity laws subject to rationality review.

Memoirs provides a template for non-majority cases in which *Marks* applies in a straightforward manner. When the opinions within non-majority cases align along a single dimension, the relationships can be described with any method previously identified. These characterizations are a complementary and consistent means of expressing a core insight, one helpfully expressed visually.

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[7] Justice Stewart's decision presents a trivial classification problem because it does not neatly align along the dimension of broad-to-narrow obscenity protection. He was listed as concurring in the dismissal for reasons expressed in his dissenting opinion in *Ginzburg v. United States*, 383 U.S. 463, 497, 499 (1966), where he stated that the First Amendment only allows suppressing "hardcore pornography" as obscene. The placement does not affect the analysis; with six Justices supporting the judgment, the same result obtains no matter which group Stewart is placed with, even the dissent. For ease of exposition, Stewart is placed with the remaining concurrences, creating three equal-size groups.

Table 1: *Memoirs v. Massachusetts* in One Dimension

(A) Douglas & Black (concurring)	(B) Stewart (concurring)	**(C) Brennan, Fortas, and Warren (plurality)**	(D) Clark, Harlan, and White (dissenting)
No proscribable obscenity	Only hard-core pornography proscribable obscenity	**"Utterly without redeeming social value" standard for proscribable obscenity**	*Roth* standard (Clark and White) or rational basis test (Harlan) for proscribable obscenity
Broad obscenity protection			**Narrow obscenity protection**

Table 1 arrays the *Memoirs* opinions along a dimension that reveals Justice Brennan's plurality (in bold) as controlling on narrowest grounds. In social choice theory, this opinion is the "Condorcet winner," meaning the dominant second choice among three opinions when none has first-choice majority sup-

port.[8] This framing identifies not only those non-majority cases where *Marks* applies in a straightforward manner, but also the cases which the premise of a single dimension does not hold.

Memoirs is a conventional non-majority case because the opinions align along a single dimension. A dimension does not imply a single issue; multiple issues often align along one dimension. Revising the opening example in which two issues, standing and the merits, yielded two dimensions, illustrates this point. If the Justices who conferred standing supported relief on the merits, and if the Justices who denied standing opposed relief on the merits, the opinions would align along a single dimension, capturing broad-to-narrow bases for relief. Along that dimension, the resolution of standing and the merits coincide. Those Justices who grant standing and relief on the merits rule for the claimant; those Justices who deny standing and relief on the merits, rule against the claimant.[9]

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[8] *See* Maxwell L. Stearns, *The Misguided Renaissance of Social Choice*, 103 YALE L.J. 1219, 1253 (1994); H.P. Young, *Condorcet's Theory of Voting*, 82 AM. POL. SCI. REV. 1231, 1239 (1963).

[9] Cases fitting this more general case category include *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), and *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978). *Casey* presented two issues, first, whether to respect *Roe v. Wade*, 410 U.S. 113 (1973), as precedent, and second, whether to strike down the challenged Pennsylvania abortion restrictions under the selected standard of review. Those issues collapsed along a dimension capturing broad-to-narrow rights to terminate unwanted pregnancies. Those Justices adhering to *Roe* as precedent voted to strike

The *Memoirs* opinions align along a dimension capturing broad-to-narrow obscenity protection. Justices Douglas, Black, and Stewart occupy the broad end, reversing the conviction with virtually complete protection; the dissenters occupy the narrow end, upholding the conviction with little protection. The plurality reversed the conviction, but announced a test permitting some future prosecutions to proceed. Of these groupings, the plurality expresses the holding on the narrowest grounds. As Justice Powell observed, except for the Sixth Circuit in *Marks* itself, "every Court of Appeals that considered the question between *Memoirs* and *Miller* so read our decisions." *Marks*, 430 U.S at 994.

Justice Powell thus emphasized a critical aspect of *Marks*. Contary to *Brief of Petitioner* (p.38), the case did not so much announce a new rule of federal common law as endorse a prevailing federal common law practice among lower courts. That practice is an almost inexorable command when

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down the challenged abortion restrictions, and those rejecting *Roe* as precedent voted to sustain those restrictions. For the portions of *Casey* not resolved by majority opinion, the plurality opinion, which upheld all but the spousal notification provision, expressed the holding on narrowest grounds for each separate judgment along the relevant dimension. The same analysis applies in *Bakke* on the issues whether (1) the use of race was legally permissible, and (2) whether the chosen method of employing race survived the selected standard of review, with the result that Justice Powell's opinion controlled for both parts of the Court's judgment. When the Court partially affirms and partially reverses the judgments below, as in these cases, the *Marks* analysis applies separately to each judgment.

construing non-majority Supreme Court decisions.

The several alternative methods of expressing the logic of *Marks* are complementary. Consider, for example, identifying the opinion consistent with the outcome with the least impact on the law. Whereas the concurring justices would prevent virtually all obscenity prosecutions, the plurality would allow some prosecutions to proceed. The lesser impact renders the plurality opinion narrower. Consider also embedded reasoning, logical subset, lowest common denominator, or nested dolls. Upon reversing the conviction, thereby granting relief, the rule allowing some future cases to proceed embraces reasoning embedded within; is a logical subset of; includes the lowest common denominator for; and is a smaller doll than, the broader rule disallowing any future cases to proceed. Finally, consider locating the opinion consistent with the outcome along the relevant dimension that is closest to the dissent. That too is the plurality opinion.

Although consistent with each formulation, the dimensionality analysis alone provides the means for identifying the limiting case. Once more, assume three coalitions: the concurring Justices, A/B; the plurality, C; and the dissenters, D. Along the dimension of broad-to-narrow obscenity protection, *Memoirs* is a straightforward case. Consider one more consistent technique, previously employed in the United States Court of Appeals for

the Seventh Circuit[10]: Each group embracing a more extreme position along the identified dimension intuitively ranks the intermediate level of protection ahead of the opposing extreme rule. The plurality emerges as a dominant second choice, or Condorcet winner, defeating each other opinion in direct pairwise comparisons.[11]

Some scholars have presented such framings as competing methods of applying *Marks*.[12] They are not. Each consistently captures the prevailing interpretation of *Marks*, including the dimensionality analysis. That final method, however, is more precise because it provides a means of identifying when the assumptions needed to apply *Marks* do not hold.

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[10] *See United States v. Gerke Excavating*, 464 F.3d 723, 724 (7th Cir. 2006) (per curiam) (Posner, Easterbrook, and Evans) ("When a majority of the Supreme Court agrees only on the outcome of a case and not on the ground for that outcome, lower-court judges are to follow the narrowest ground to which a majority of the Justices would have assented if forced to choose.").

[11] As applied to *Memoirs*, the analysis implies that the concurrences rank A/B, C, D; the dissent ranks D, C, A/B, and the plurality could rank either C, A/B, D or C, D, A/B. Either way, the plurality, C, emerges as the Condorcet winner, defeating A/B and D in direct comparisons.

[12] *See, e.g.*, Williams, *Questioning* Marks, *supra* note 4; Richard M. Re, *Beyond the Marks Rule* 24–36 (Dec. 19, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3090620.

B. The Marks Premise Fails when Opinions Do Not Align Along One Dimension

Kassel v. Consolidated Freightways, 450 U.S. 662 (1981), reveals the limited conditions under which the premise of *Marks* fails to hold. Petitioner challenged an Iowa ban on the use of 65-foot twin trailers, which surrounding states allowed, with exceptions benefiting in-state interests. The Supreme Court struck down the challenged law without a majority opinion. Justice Powell wrote for a plurality of four; Justice Brennan concurred in the judgment for two; and then-Associate Justice Rehnquist dissented for three.

The opinions agreed on the underlying issues: (1) Should the trial court apply a balancing test, independently weighing the law's asserted safety justifications against the claimed burdens on interstate commerce, or, should it apply deferential rationality review, disallowing judicial weighing?; and (2) Whichever substantive test applies, must the trial court exclude evidence, introduced initially at trial, supporting arguments not considered by contemporaneous lawmakers? Each issue, the substantive test and the evidentiary rule, presented a binary choice: apply a strict or a lax rule.

Justice Powell, writing for the plurality, applied the lax evidentiary rule, allowing novel evidence, but the strict substantive rule, independently weighing of costs and benefits. He concluded that the federal interest in commerce outweighed the state's asserted safety justifications. Justice Brennan, concurring in the judgment, resolved each issue in opposite fashion, applying the

lax rationality test, but applying the strict evidentiary rule, disallowing trial evidence supporting novel justifications. Excluding such evidence, Justice Brennan determined that the actual legislative justifications pointed toward protectionism. Because protectionism cannot be a rational justification, he found the challenged law *per se* invalid. Finally, Justice Rehnquist partially agreed with each remaining opinion, yet he dissented. He agreed with Justice Brennan that the courts should not independently weigh costs and benefits, applying the lax rationality test. And he agreed with Justice Powell that novel evidence was admissible. Coupling the lax substantive test with the lax evidentiary rule, Rehnquist concluded that novel evidence supported a rational justification for the law.

As shown in Table 2, because *Kassel* implicates two dimensions, the *Marks* premise fails to hold.

Table 2: *Kassel v. Consolidated* Freightways in Two Dimensions

		Narrow	**Broad**
		Rational Basis	Balancing
Narrow	Admit Novel Evidence	(B) Rehnquist, Burger, Stewart	(A) Powell, White, Brennan, Stevens
Broad	Exclude Novel Evidence	(C) Brennan, Marshall	

The following assumption is consistent with each *Kassel* opinion: If (1) rational basis applies, and (2) novel evidence is admissible, the law should be sustained; absent either precondition to sustaining the law, it should be struck down. Justices Powell and Brennan each denied one condition needed to sustain the law, with Justice Powell applying the stricter substantive test and with Brennan applying the stricter evidentiary rule. Justice Rehnquist found both conditions necessary to sustain the challenged law, but dissented.

The analysis can be expressed in various ways. First, consider separate majority resolutions of each controlling issue. One majority applies rationality review (the Justice Brennan plus Justice Rehnquist camps, totaling five). A second majority admits novel evidence (the Justice Powell plus Justice Rehnquist camps, totaling seven). Issue by issue, the dissent prevails.[13] Instead, the case is resolved by outcome voting, with the Justice Powell and Justice Brennan camps, totaling six, striking the law down. Alternatively, consider intuitive rank orderings by each camp over the remaining opinions. Unlike in *Memoirs*, the exercise fails. *A priori*, we cannot assume that either camp voting to strike down the challenged law would rank second an opinion agreeing on one issue, yet reaching the opposite judgment, or an opinion opposite on both issues, yet reaching the same judgment.[14]

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[13] Some scholars advocate various forms of issue voting, a question not before this Court. For a critical analysis, see Stearns, *Outcome Voting*, *supra* note 5 (reviewing literature). *See also Hanover 3201 Realty v. Village Supermarkets, Inc.*, 806 F.3d 162, 184, 189 (3d Cir. 2015) (Ambro, J., dissenting in part and concurring in part) (defending his vote switch and reviewing literature in part III); *id.* at 196, 204 (Greenberg, J., dissenting) (criticizing Judge Ambro's vote switch and reviewing literature in part II).

[14] For a discussion expressing this in terms of a cycle, see STEARNS, CONSTITUTIONAL PROCESS, *supra* note 5, at 99–106 (demonstrating that with preferences (A) ABC, (B) BCA, and (D) CAB, A is preferred to B, and B is preferred to C, yet C is preferred to A.) Social choice theorist Donald Saari ascribes cycling to "the curse of dimensionality." *See* SAARI, *supra* note 6.

In non-majority cases implicating two dimensions, the *Marks* premise does not hold. Neither opinion consistent with the *Kassel* outcome expresses the holding on narrowest grounds. Because *Kassel* struck down the Iowa statute, the narrowest grounds opinion achieves that outcome while striking down the fewest laws. On the standard of review, Justice Brennan's opinion is narrower because rationality review would sustain more laws, and on the evidentiary rule, Justice Powell's opinion is narrower because admitting novel evidence would sustain more laws. Because neither ground alone sustains the challenged law, the opinions implicate two dimensions.

The characteristic features of cases implicating two dimensions are separate opinions achieving the same judgment with opposite resolutions of each dispositive issue, and a dissenting opinion resolving one issue favorably to each remaining camp, yet producing the opposite judgment. This coincides with majority resolutions of controlling issues leading to the dissent.

C. The Eleventh Circuit Correctly Applied *Marks* to *Freeman*

As *Miller* and *Marks* demonstrate, this Court may select the reasoning of any of the *Freeman* opinions, or it may devise a new rule. Lower courts are bound by the narrowest grounds doctrine; this Court is not. The *Marks* Court resolved how to identify the narrowest grounds opinion in *Memoirs* to assess petitioners' due process claim. It did so having already displaced the plurality *Memoirs* standard in *Miller*.

Applying *Marks* to *Freeman* is, nonetheless, straightforward. Freeman entered into a plea agreement, pursuant to FED. RULE CRIM. P. 11(c)(1)(C), and the relevant range for one offense was later retroactively reduced under the Federal Sentencing Guidelines. Under 18 U.S.C. § 3582(c)(2), convicted offenders may be considered for resentencing following a plea if the plea was "based on a sentencing range that has subsequently been lowered by the Sentencing Commission . . . ." In *Freeman*, the Supreme Court addressed the circumstances in which a sentence imposed following a plea agreement satisfies that statutory test.

Justice Kennedy's plurality opinion defined sentences following a plea agreement that are based on the guidelines broadly. He stated: "Rule 11(c)(1)(C) makes the parties' recommended sentence binding on the court 'once the court accepts the plea agreement,' but the governing policy statement confirms that the court's acceptance is itself based on the Guidelines. See USSG § 611.2." *Freeman*, 564 U.S. at 529. By contrast, Justice Sotomayor's concurrence in the judgment defined when a sentence imposed following a plea agreement should be presumed to be based on the Guidelines more narrowly. She concluded that following a plea, the sentence should be presumed to be based on the agreement rather than the Guidelines, except in the following circumstances: when (1) "agreements . . . call for the defendant to be sentenced within a particular Guidelines sentencing range," or (2) "a plea agreement . . . provide[s] for a specific term of imprisonment—such as a number of months—but also make[s] clear that the basis for the specified term is a Guidelines sentencing range

applicable to the offense to which the defendant pleaded guilty." *Id.* at 538–39 (Sotomayor, J., concurring in judgment). Finally, the Chief Justice, writing in dissent for four, determined that a sentence entered pursuant to a plea is not based on the Guidelines, but rather is based on the plea agreement. Although the Chief Justice voted to deny Freeman relief, he agreed with the plurality that Justice Sotomayor's test was unworkable. *Id.* at 544 (Roberts, C.J., dissenting).

The *Hughes* parties agree that there is a material difference in the facts of *Freeman* and *Hughes*. In *Freeman*, part of the sentence was based on the low end of the permissible Guidelines range, which was subsequently retroactively reduced. In *Hughes*, the plea agreement was below the low end of the Guidelines range, and did not otherwise meet Justice Sotomayor's two exceptions to eligibility for reconsideration, but it did fall within the scope of Justice Kennedy's broader presumption that the sentencing judge considered the Guidelines in imposing the sentence following a plea.

This difference produces divergent outcomes under *Freeman* depending on whether Justice Kennedy's opinion or Justice Sotomayor's opinion controls. The *Freeman* plea contained elements that allowed Justices Sotomayor and Justice Kennedy both to conclude that the sentence was based on the Guidelines. By contrast, the Eleventh Circuit determined that under Justice Kennedy's test, the *Hughes* plea was based on the Guidelines, whereas under Justice Sotomayor's test, it was not. The parties do not dispute this. The Eleventh Circuit recognized that choosing the controlling opinion under the narrowest

grounds doctrine controlled the case outcome, denying Hughes relief.

Despite criticizing Justice Sotomayor's analysis, the plurality and dissent each treated it as controlling under *Marks*. Justice Kennedy stated: "the opinion concurring in the judgment suggests an intermediate position." *Freeman*, 564 U.S. at 532. The Chief Justice implicitly conceded that as well, devoting nearly his entire dissent to refuting the merits of her analysis. Chief Justice Roberts also stated: "Finally, JUSTICE SOTOMAYOR's approach will foster confusion in an area in need of clarity," *id.* at 550 (Roberts, C.J. dissenting), and "But those who will really be left with a sour taste after today's decision are the lower courts charged with making sense of it going forward." *Id.* at 551.

The *Hughes* court likewise identified Justice Sotomayor's opinion as controlling:

> When applying the rule of *Marks* to a splintered Supreme Court opinion, we must determine which opinion that supports the judgment relied on the narrowest grounds. Applying this rule to *Freeman*, it is clear that Justice Sotomayor's opinion controls because "'sometimes' is a middle ground between 'always' and 'never.'" *Duvall*, 740 F.3d at 612 (Kavanaugh, J., concurring in the denial of rehearing en banc). As a result, we must apply Justice Sotomayor's concurring opinion to determine whether Hughes qual-

> ifies for a sentence reduction under section 3582(c)(2). *United States v. Hughes*, 849 F.3d 1008, 1015 (11th Cir. 2017).

Petitioner Hughes implies that Justice Sotomayor's opinion controls under *Marks*. Along with Respondent, Petitioner concedes that whereas Justice Kennedy's analysis provides relief, and the dissent denies relief, to both Freeman and Hughes, Justice Sotomayor's approach would grant relief to Freeman, but deny relief to Hughes. One can characterize this using any of the previously identified framings. Each reinforces the intuition that the *Freeman* opinions can be expressed along one dimension. The reasoning of Justice Sotomayor's opinion is embedded within, is a logical subset of, embraces the lowest common denominator respecting, and is nested within, Justice Kennedy's broader approach. It is likewise consistent to express Justice Sotomayor's opinion as the Condorcet winner, the dominant second choice, the opinion consistent with the outcome closest to the dissent, or the median position. Each framing expresses the same intuition and achieves the same result. This is true not only in *Freeman*, but in every case in which the *Marks* premise holds.

The Eleventh Circuit correctly applied *Marks* to *Freeman* in *Hughes*. Although this Court need not revisit that application to resolve this case, should it wish to provide additional guidance to lower courts

in applying *Marks*, *Amici curiae* suggest the following[15]:

> When this Court issues a non-majority decision, lower courts should presume that the opinions can be expressed along a single dimension, and when all justices are participating, apply that opinion that represents the median position on the Court, generally coinciding with the position closest to dissent for each separate judgment. When two or more opinions consistent with the outcome resolve the controlling issues in opposite fashion, yet reach the same judgment, and when the dissenting opinion resolves one or more issues favorably to each of those opinions yet achieves the opposite judgment, the premises underlying the narrowest grounds rule do not apply. This is evident when

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[15] This statement broadly covers all but a minuscule subset of non-majority opinions not implicated in *Hughes*, and thus better addressed in such a case. As explained in STEARNS, CONSTITUTIONAL PROCESS, *supra* note 5, at 152-53, social choice identifies an inevitable subset of intractable collective decision making problems. The Supreme Court's combined rules, including outcome voting and *Marks*, resolve the general run of cases, isolating collective choice problems, as much as feasible, to that subset.

> majority resolutions of controlling issues lead logically to the dissent. Lower courts should not presume that one or more justices embracing a broader rule, whether consistent with the outcome or in dissent, prefers an opposing broad rule to an opinion expressing the apparent narrowest grounds opinion, unless the Justice clearly signals that intent by joining the opinion.

D. Abandoning *Marks* Would Compromise Norms that Motivate Forming Majority Supreme Court Opinions

If this Court were to abandon the *Marks* rule, it would not only create problems of guidance and indeterminacy in cases in which the *Marks* premise properly applies; it would also undermine norms that help forge successful majority opinions. The *Marks* doctrine is important beyond the limited category of cases in which it formally applies. The narrowest grounds doctrine serves two purposes. *Marks* not only governs identifying the controlling opinion in non-majority cases; it also creates a norm affecting judicial accommodations within the Supreme Court itself.

Adarand Constructors v. Pena, 515 U.S. 200 (1995), illustrates how abandoning *Marks* would

compromise that norm. In *Adarand*, Justice O'Connor, writing for a majority,[16] applied strict scrutiny in challenges to federal race-based set-aside programs. *Adarand* overruled part of an earlier majority Supreme Court case, *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990), which had instead applied intermediate scrutiny. The critical portion of *Adarand* was decided 5-4, with the dissenting Justices voting to retain the *Metro Broadcasting* test.

Although five Justices comprised the *Adarand* majority on this issue, a latent split remained as between Justice O'Connor, for the majority, and Justice Scalia, who joined her opinion and who also wrote a separate concurrence in part and concurrence in the judgment in part. The Court clerk signaled the split with the following unusual disclaimer. The reporting statement identified the relevant parts of Justice O'Connor's opinion as for the Court "except insofar its it might be inconsistent with the views expressed in Justice Scalia's concurrence." *Adarand*, 515 U.S. at 204.

In part IV-D of her majority opinion, Justice O'Connor reiterated her earlier argument against the claim that "strict scrutiny is strict in theory, but fatal in fact." *Adarand*, 515 U.S. at 237 (internal quotation omitted). Justice O'Connor suggested that, at least in theory, some race-based preferences

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[16] This excludes part III-C of Justice O'Connor's opinion, on the separate issue of stare decisis, which only Justice Kennedy joined. *Adarand*, 515 U.S. at 231.

might survive the heightened standard of review.[17] In his separate opinion, Justice Scalia reiterated his view that virtually all race-based classifications are unconstitutional. For Justice Scalia, strict scrutiny was, and should be, fatal.

Notwithstanding this significant difference respecting a critical part of Justice O'Connor's majority opinion, Justice Scalia joined. This decision helps to illustrate *Marks*'s second critical function.

Adarand presented three views that can be expressed along a single dimension. The dissenters would have employed intermediate scrutiny and upheld the challenged race-based program; Justice O'Connor applied strict scrutiny, striking the program down, but left open the possibility of race-based programs that might satisfy her test; and Justice Scalia applied strict scrutiny, but would have closed the door to virtually any race-based programs. The three opinions align along the dimension capturing broad-to-narrow equal protection limits on race-based set-aside programs.

Had Justice Scalia declined to join part III-D of Justice O'Connor's opinion, his opinion on this issue would have rested on broader grounds, and thus it would not have controlled under *Marks*. The result would have been a 1-4-4 split, with Justice O'Connor's strict, non-fatal, test stating the holding on narrowest grounds. It appears likely that because Justice Scalia would not have stated the holding in

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[17] *Grutter v. Bollinger*, 539 U.S. 306 (2003), revealed that the remaining non-fatal case involved race-based affirmative action programs in state institutions of higher learning.

any event, he joined Justice O'Connor's opinion, including the part with which he disagreed, to give *Adarand* majority status. This was necessary to overturning the part of *Metro Broadcasting* resting on intermediate scrutiny. Whether or not Justice Scalia joined, Justice O'Connor's opinion would have expressed the *Adarand* Court's holding. But only if Justice Scalia joined would Justice O'Connor's opinion acquire needed precedential status on the Court to displace the *Metro Broadcasting* rule.[18]

Adarand highlights a critical feature of *Marks*. Although lower courts are obligated to adhere to narrowest grounds opinions, the Supreme Court is not. This is not a normative claim about how *Marks should* apply; it is a recognition of how this Court applies *Marks*. This Court is not bound by nonmajority narrowest grounds opinions. That facet of

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[18] *Washington v. Glucksberg*, 521 U.S. 702 (1997), is the converse of *Adarand*. Justice O'Connor joined a majority opinion, holding that there is no due process right to physician-assisted suicide, but separately concurred, expressing her narrower view endorsing the double-effect doctrine. That doctrine allows physicians to administer palliative care, such as morphine, even if doing so hastens death, provided the purpose is not termination of life. *Glucksberg* brings the accommodative and predictive readings of *Marks* into potential conflict. Although Justice O'Connor represented the median view, she incurred no cost in expressing her narrower view because she also joined the majority opinion, giving it precedential status. Had Justice O'Connor concurred in the judgment, her narrowest grounds opinion would have controlled under *Marks*, but would not have created a precedent on the Court itself. Contrary to Professor Re, *supra* note 12, at 22, *Marks* motivates the Justices to forge majority opinions or to pay a price of a nonprecedential opinion in the Supreme Court.

Marks encourages majority opinions because only majority opinions gain desired precedential status on the Court itself.

Imagine instead that this Court were to adopt the approach to non-majority opinions endorsed by Petitioner. Even when the Court issues a non-majority decision in which the opinions align along one dimension, lower courts would be free to adopt the reasoning of whichever opinion consistent with the judgment they deem more persuasive, or even to devise independent rationales.

In *Adarand*, Justice Scalia preferred his broader, strict and fatal, rationale, to Justice O'Connor's strict, non-fatal, rationale. Unconstrained by *Marks*, which would render Justice O'Connor's opinion controlling, Justice Scalia might well have elected not to join the part of her opinion that overturned *Metro Broadcasting*, resting only on his separate opinion. The resulting non-majority opinion would have allowed lower courts to select his reasoning or Justice O'Connor's, or to devise their own. Instead, under *Marks*, because Justice O'Connor's holding would have controlled in lower courts even without Justice Scalia joining, Justice Scalia was encouraged to join her opinion, thereby forging a majority precedent. Abandoning *Marks* risks not only undermining that doctrine's guidance function; it also risks encouraging more non-majority cases.

II. Further Arguments Against Recognizing Justice Sotomayor's Opinion as Controlling under *Marks* are Unpersuasive

A. Despite strong disagreement with Justice Sotomayor's opinion, *Freeman* is not a Case of Ambiguous Dimensionality

Even in straightforward non-majority cases like *Memoirs* and *Freeman*, one might hypothesize that the opinions do not necessarily align along one dimension. Consider, for example, a case arising under the Due Process or Equal Protection Clauses, or under the Fourth Amendment, with one opinion granting relief under a bright-line rule, another granting relief with a balancing test, and a third denying relief with a contrary bright-line rule. One or more Justices embracing either bright-line rule might, in theory, prefer the opposite bright-line rule to the seeming middle ground. If the split were 4-1-4, this would undermine the claim that the intermediate position resolves the case on narrowest grounds. A Justice, for example, who is sufficiently concerned about administrative problems under a balancing test might prefer an opposite bright-line rule, coupled with an opposite judgment, to the seeming intermediate opinion. This would map what otherwise appears as a single dimension case, susceptible to a straightforward application of *Marks*, onto two dimensions, thereby undermining the *Marks* premise. At a minimum, the possibility might appear to render dimensionality ambiguous.

The problem is exacerbated by an inherent feature of Supreme Court opinion writing; Justices are not called upon to, and typically do not, provide com-

plete information of the sort needed to confirm intuitions, however compelling, as to how they would rank each remaining opinion. In the subset of non-majority cases such as *Kassel*, we can infer multi-dimensionality from previously identified objective features: When two opinions resolve the controlling issues in opposite fashion yet achieve the same judgment, and when the dissenting opinion provides a partially favorable resolution to each remaining opinion, yet reaches a contrary judgment, the case implicates two dimensions, and the *Marks* premise breaks down. In such cases, majority resolutions of controlling issues lead to the dissent.

Lower courts cannot know with certainty, however, what the rankings over each opinion are for those Justices embracing seemingly more extreme opinions, such as opposing bright-line rules. This remains true even though opposing resolutions of the controlling case issues, coupled with opposing judgments, strongly imply a single dimension. Administering the narrowest grounds doctrine necessarily requires resting on logical presumptions, and the strength of those presumptions depends on whether *Marks*, or an alternative, is the default rule. With *Marks* in place, these presumptions need only be invoked when this Court fails to produce a majority opinion. As previously explained, abandoning *Marks* undermines norms that help promote majority opinions. An unintended consequence of abandoning *Marks*, therefore, would be requiring lower courts to invoke a set of workable presumptions over a larger number of cases.

In a minuscule set of Supreme Court cases, one or more justices switched votes, acquiescing in a con-

trary majority resolution of a controlling issue as compared with how that Justice would have resolved the issue on its merits. The vote-switching Justice thus reached an issue otherwise foreclosed by the internal logic of the written or joined opinion, or transformed what would have been *dicta* on one issue into part of the Court's holding. The consequence of the vote switch in each case was to achieve a contrary majority resolution on that issue, and ultimately on the judgment, for the Court as a whole.

To illustrate, reconsider the hypothetical in which a 4-1-4 Court denies relief, with four justices who deny standing, but who would have granted relief on the merits; one justice who confers standing, but would deny relief on the merits; and four dissenting justices who would confer standing and grant relief on the merits. Under outcome voting, the result is a non-majority case denying relief, with opinions across two dimensions.

Assume one member of the plurality seeking to avoid this result acquiesces to the contrary five-Justice majority on standing. This Justice transforms the dissenting group into a majority that grants standing and relief on the merits. The vote switch not only changes the judgment; it also produces a majority opinion. When a Justice switches votes, we can infer an underlying problem of dimensionality, albeit one resolved in favor of a majority opinion by the switch itself. Although members of

this Court and legal scholars have criticized vote switching, no rule prohibits it.[19]

In *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 59–66 (1996), Chief Justice Rehnquist, writing for a majority, declined in part to give precedential status to *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989). The Chief Justice implied that Justice White's vote switch in *Union Gas* undermined the presumption that majority decisions are entitled to precedential deference. More recently, in *Hanover 3201 Realty v. Village Supermarkets, Inc.*, 806 F.3d 162 (3d Cir. 2015), Judge Ambro and Judge Greenberg, of the United States Court of Appeals of the Third Circuit, debated the merits of Judge Ambro's vote switch, discussing in-depth several of the scholarly works cited in this brief.

Vote switching rarely occurs. Whatever one's normative view of the practice, it remains available as a means of signaling discontent with a case presenting an underlying problem of dimensionality. Since it results in a majority opinion, vote switching ultimately avoids the need to apply *Marks* in a context in which its premise fails to hold. The availability of vote switching, and the rarity with which it is exercised, reinforces the intuition that non-majority cases that appear to rest along a single dimension actually do rest on a single dimension.

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[19] *See, e.g.*, John M. Rogers, *"I Vote This Way Because I'm Wrong": The Supreme Court Justice as Epimenides*, 79 KY. L. REV. 439 (1990-91); Maxwell L. Stearns, *Should Justices Ever Switch Votes?*, *supra* note 5 (collecting cases).

This intuition is reflected in the proposed guidance statement for lower courts. Lower courts should assume a single dimension, and thus that *Marks* applies, absent either of the two identified circumstances: (1) objective markers of two dimensions, as seen in *Kassel*, and (2) a revealed intent, through voting behavior, that transformed what might have been a two-dimensional non-majority case into a majority opinion. Signaling is costly to the Justice who sends it because vote switching requires subordinating a preferred ruling on an issue and risks limiting the precedential impact of the resulting majority opinion, as seen in *Seminole Tribe*. Presuming a single dimension unless a Justice willingly incurs that cost helps ensure that lower courts understand when to assume that the *Marks* doctrine does and does not apply.

Absent such direct evidence that opinions do not align on one dimension, lower courts should not presume that in a case in which one camp embracing a balancing, or other intermediate, test is bounded by two camps embracing opposing bright-line rules that a Justice favoring one of the bright line rules would prefer the opposite bright line rule to the apparent middle ground. This analysis holds even when the opinions are 4-1-4 as an opinion of one sometimes dominates along a single dimension. A Justice wishing to signal preferring a seemingly opposite extreme view has the option, and must bear some cost, to make that plain. The Justice may do so, for example, by conceding to a majority that rejects any form of balancing text, and joining those who embrace the opposite bright line rule. Doing so displaces the application of *Marks*, and, at the same time, changes

the Court's judgment. This only succeeds, however, if there is a clear understanding that the narrowest grounds doctrine is, in fact, the default rule. This is the regime embraced by current practice. That practice minimizes opportunities for lower court speculation as to which opinion controls in non-majority Supreme Court cases.

B. The *Epps* Hypotheticals Implicate the Holding-*Dictum* Distinction, not the Application of *Marks* to *Freeman*.

Petitioner's Brief (p.52) relies on hypotheticals that appear to invert the relationship between Justice Kennedy's and Justice Sotomayor's opinions in *Freeman*. *See United States v. Epps*, 707 F.3d 337, 350 n.8 (D.C. Cir. 2013); see also *United States v. Davis*, 825 F.3d 1014, 1023 (9th Cir. 2016) (*en banc*). The *Davis* court summarized the hypotheticals as follows:

> [T]he parties may state in the plea agreement that a particular range applies and agree to a sentence at the bottom of that range, but the district court may not agree that the range determined by the parties applies, finding for example that the career offender range is applicable instead, but notwithstanding this finding accept the plea because it is to a term that is acceptable to the court for reasons unrelated to the guideline range determined by the parties.
>
> [*Epps*, 707 F.3d at 350] n.8. Justice Sotomayor would allow a sentence re-

> duction in this example because the agreement explicitly "call[s] for the defendant to be sentenced within a particular Guidelines sentencing range." *Freeman*, 564 U.S. at 538, 131 S. Ct. 2685 (Sotomayor, J., concurring in the judgment). The plurality, on the other hand, "would find [Freeman] ineligible because the range that the parties agreed to played no role in the court's determination that this was an appropriate sentence, despite the fact that the court imposed the agreed-upon term of imprisonment." *Epps*, 707 F.3d at 350 n.8. Thus, the plurality opinion is actually the narrower one in certain respects.

A second example produces a similar result:

> The sentencing court ... might consider and reject the guideline range used by the parties, not because the court finds that a different guidelines range (such as the career offender range) applies, but because, having considered the applicable guidelines range, the court rejects it as a matter of policy and selects its sentence without regard to it.

Id. Here again, if the court decides "for reasons unrelated to the guidelines range to impose the sentence the parties agreed upon," the defendant would be

> eligible for a reduction under Justice Sotomayor's approach but not under the plurality's. *Id. Davis*, 825 F.3d at 1023.

These seemingly anomalous results arise from a specific feature in the wording of Justice Sotomayor's *Freeman* opinion, which the Chief Justice discussed in dissent. The Chief Justice explained:

> In the first half of the opinion, the inquiry properly looks to what the judge does: He is, after all, the one who imposes the sentence. After approving the agreement, the judge considers only the fixed term in the agreement, so the sentence he actually imposes is not "based on" the Guidelines.
>
> In the second half of the opinion, however, the analysis suddenly shifts, and focuses on the parties: Did they "use" or "employ" the Guidelines in arriving at the term in their agreement? But § 3582(c)(2) is concerned only with whether a defendant "has been sentenced to a term of imprisonment based on a sentencing range." Only a court can sentence a defendant, so there is no basis for examining why the parties settled on a particular prison term. *Freeman*, 564 U.S. at 547 (Roberts, C.J., dissenting).

As applied to both defendant Freeman and defendant Hughes, this analytical shift did not come

into play. The different case facts, with the *Freeman* plea at the low end of a subsequently reduced Guideline range, and the *Hughes* plea below the low end of the Guideline range, and not meeting Justice Sotomayor's other conditions, provide the basis for an application on which the parties agree: if Justice Kennedy's opinion controls, both Freeman and Hughes obtain relief, and if Justice Sotomayor's opinion controls, Freeman obtains relief, but Hughes does not.

In the hypotheticals, by contrast, the plea agreement recommends sentencing based on a Guidelines range or recommends a sentence based on the guidelines, but the judge imposes the same sentence, or another, for reasons independent of the plea agreement or the Guidelines. Although Justice Sotomayor's analytical shift, from focusing on the bases for the judge's sentencing determination to the bases for the parties' plea agreement is not implicated in *Freeman* and *Hughes*, it could arise in future cases.

Justice Sotomayor's *Freeman* opinion might be read to imply that whereas Justice Kennedy generally presumes that a sentence following a plea agreement is based on the Guidelines, she applies that presumption only in cases with objective evidence of a meeting of the minds as between the lawyers writing the plea agreement and the sentencing judge that sufficiently demonstrates that the sentence is based on the Guidelines. The disjunctive language, shifting from judge to lawyers, leaves open the possibility, whether or not intended, of a case in which the lawyers intend a sentence based on the Guidelines, but the judge does not. Conversely, Justice Kennedy's opinion, by focusing on the judge's intent,

leaves open the possibility, again whether or not intended, that although the lawyers might intend the sentence to be based on the Guidelines, a judge might expressly signal otherwise.

Resolving these hypotheticals is unnecessary. Each at most raises the limits of the reasoning within Justice Sotomayor's or Justice Kennedy's opinions, but not the question of which opinion expresses the *Freeman* holding on narrowest grounds. As applied to the *Freeman* facts, Justice Sotomayor's opinion is narrower because it permits relief in fewer future cases. *Hughes* demonstrates that narrower reach.

The attenuated nature of these hypotheticals is not the problem. Rather, the problem is that any opinion, for a majority or even a unanimous Court, can invite hypotheticals that test the limits of its stated reasoning, thereby demonstrating it to be unintentionally over- or under-inclusive.[20] Accepting a dominant second choice no more implies agreeing to every proposition taken to it logical extreme than does joining a majority opinion; nor does it imply predicting future doctrinal directions, irrespective of potential changes on the Court. Lower courts confront the challenge of discerning the proper scope of

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[20] Identifying an opinion as controlling under *Marks* does not imply that no set of hypothetical facts could test the limits of the holding. Identifying the holding generally focuses on what is necessary to resolve the immediate case. Although there are limits to the necessity analysis, *see* Michael Abramowicz & Maxwell Stearns, *Defining Dicta*, 57 STAN. L. REV. 953, 1055–61 (2005), that understanding remains helpful in the general run of cases, including *Freeman*.

holdings regardless of the number of Justices joining the controlling opinion. Sorting holding and *dictum* is independent of identifying which opinion controls under *Marks*.

CONCLUSION

The Eleventh Circuit correctly applied *Marks* in *Hughes*. This Amicus expresses no view on how the *Hughes* case should be resolved.

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No. 17-155

IN THE
Supreme Court of the United States

ERIK LINDSEY HUGHES,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari
To The United States Court of Appeals
For The Eleventh Circuit

BRIEF AMICI CURIAE OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND THE NATIONAL ASSOCIATION OF FEDERAL DEFENDERS IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

This Court explained in *Marks v. United States*, 430 U.S. 188, 193 (1977), that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'" In *Freeman v. United States*, 564 U.S. 522 (2011), the Court issued a fractured 4-1-4 decision concluding that a defendant who enters into a plea agreement under Fed. R. Crim. P. 11(c)(1)(C) may be eligible for a reduction in his sentence if the Sentencing Commission subsequently issues a retroactive amendment to the Sentencing Guidelines. But the four-Justice plurality and Justice Sotomayor's concurrence shared no common rationale and the courts of appeals have divided over how to apply Freeman's result.

The questions presented are:

1. Whether this Court's decision in *Marks* means that the concurring opinion in a 4-1-4 decision represents the holding of the Court where neither the plurality's reasoning nor the concurrence's reasoning is a logical subset of the other.

2. Whether, under *Marks*, the lower courts are bound by the four-Justice plurality opinion in *Freeman*, or, instead, by Justice Sotomayor's separate concurring opinion with which all eight other Justices disagreed.

3. Whether, as the four-Justice plurality in *Freeman* concluded, a defendant who enters into a Fed. R. Crim. P. 11(c)(1)(C) plea agreement is generally eligible for a sentence reduction if there is a later, retroactive amendment to the relevant Sentencing Guidelines range.

TABLE OF CONTENTS

Page

INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 3

ARGUMENT 5

I. The *Freeman* Concurrence Leads to Unpredictable Results Because Parties Rely on the Sentencing Guidelines But Do Not Draft Plea Agreements with Retroactive Resentencing in Mind 5

A. The Sentencing Guidelines are key to all pleas because prosecutors must make them central to their decisions 5

B. Defendants use their limited plea leverage to address pressing, current issues 8

1. Defendants almost universally plead guilty 8

2. Defendants who plead prioritize current issues over uncertain future eventualities like retroactive Sentencing Guidelines 11

C. Rule 11(c)(1)(C) plea agreements differ by jurisdiction 13

TABLE OF CONTENTS
(continued)

Page

D. Variations in plea agreements lead to different resentencing outcomes for similarly-situated defendants 18

II. The *Freeman* Concurrence Leads to Inequitable Results Because Eligibility for Resentencing Does Not Necessarily Reflect the Parties' Actual Intent 20

III. The *Freeman* Concurrence Leads to Inconsistent Results for Defendants with Similar Plea Agreements Because There is Confusion About the Level of Specificity Required 24

IV. *Freeman* Should Be Modified to Provide a Clear, Administrable Rule 27

A. Justices have recognized the importance of clear, administrable rules rather than creating 4-1-4 split decisions 27

B. The proper rule is for all Rule 11(c)(1)(C) defendants to be resentenced when a guidelines range implicated by their plea is amended retroactively 30

C. Congress or the United States Sentencing Commission can always revise this rule if desired 31

CONCLUSION 32

TABLE OF AUTHORITIES

Page(s)

CASES

Alleyne v. United States,
570 U.S. 99 (2013) 4, 28, 29

Apprendi v. New Jersey,
530 U.S. 466 (2000) 29

Arizona v. Gant,
556 U.S. 332 (2009) ..... *passim*

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434 U.S. 357 (1978) 9

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398 U.S. 235 (1970) 32

Burwell v. Hobby Lobby Stores, Inc.,
134 S. Ct. 2751 (2014) 30

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135 S. Ct. 547 (2014) 30

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560 U.S. 817 (2010) 13

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333 U.S. 611 (1948) 29

Missouri v. Frye,
566 U.S. 134 (2012) 12

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536 U.S. 584 (2002) 30

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No. 6:11-CR-00040-GFVT-HAI-1, 2017
WL 3701444 (E.D. Ky. Aug. 28, 2017) 25

United States v. Anderson,
No. 16-CR-33 (M.D. Ga. Aug. 23, 2017) 17

United States v. Baldwin,
No. 13-CR-248 (M.D. Pa. Sept. 29, 2014) 17

United States v. Biddy,
No. 17-CR-40011 (D. Mass. May 16, 2017) ... 16, 19

United States v. Blackshell,
No. 17-CR-6133 (W.D. N.Y. Nov. 3, 2017) 14

United States v. Booker,
543 U.S. 220 (2005) 5, 6

United States v. Brooks,
No. 6:15-CR-6157
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No. 17-CR-60 (C.D. Cal. Feb 2, 2017) 14, 19

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(continued)

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No. 2:13-CR-74, 2017 WL 5178785
(E.D. Tenn. Nov. 7, 2017) 21

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No. 14-CR-21 (W.D. Va. May 21, 2014) 17

United States v. Cornwell,
No. 16-MJ-29 (W.D. Ky. July 19, 2016) 16

United States v. Cuff,
No. 15-CR-110 (E.D. Wash. Oct. 28, 2015) ... 16, 19

United States v. Dixon,
687 F.3d 356 (7th Cir. 2012) 20, 21, 24, 26

United States v. Dudley,
15-CR-34 (E.D. Ky. Oct. 27, 2016) 15, 18, 19

United States v. Espola,
No. 17-CR-40023 (D. Mass. May 17, 2017) ... 18, 19

United States v. Fackrell,
No. 12-CR-33 (M.D. Pa. Feb. 15, 2012) 17

United States v. Feiten,
No. 15-CR-20631
(E.D. Mich. May 25, 2016) 15

United States v. Garcia,
No. 13-CR-462 (C.D. Cal. July 3, 2013) 16, 19

United States v. George,
664 F. App'x 465 (6th Cir. 2016) 23

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869 F. Supp. 2d 208 (D. Mass. 2012) 25, 26

TABLE OF AUTHORITIES
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Page(s)

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No. 15-CR-58 (E.D. Tex. July 8, 2016) 15

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No. 15-CR-155 (D. Kan. Mar. 9, 2016) 15

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859 F. Supp. 2d 97 (D.D.C. 2012) 22

United States v. Hopson,
No. 12-CR-444 (D. Colo. Sept. 29, 2014) 15

United States v. Jordan,
853 F.3d 1334 (10th Cir. 2017) 24

United States v. Marple,
No. 14-CR-35 (W.D. Va. Feb. 11, 2015) 17, 18

United States v. McCall,
649 F. App'x 114 (2d Cir. 2016) 22, 23

United States v. McNeese,
819 F.3d 922 (6th Cir. 2016) 21, 24, 26

United States v. Molina,
No. 17-CR-40012
(D. Mass. April 26, 2017) 16

United States v. Peters,
No. 16-CR-315 (D. Neb. Nov. 8, 2016) 15

United States v. Portorreal,
No. 16-CR-210 (E.D. Va. Oct. 20, 2016) 15

United States v. Rafal,
No. 17-CR-10004 (D. Mass. Nov. 29, 2016) 16

United States v. Rivera-Martinez,
665 F.3d 344 (1st Cir. 2011) 25

TABLE OF AUTHORITIES
(continued)

Page(s)

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No. 16-CR-12 (E.D. Wash. May 24, 2016) 15

United States v. Slatt,
No. 16-CR-51 (E.D. Wash. Nov. 9, 2016) 16, 19

United States v. Smith,
658 F.3d 608 (6th Cir. 2011) 23

United States v. Weatherspoon,
696 F.3d 416 (3d Cir. 2012) 24

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No. 2:13-CR-34, 2017 WL 5178755
(E.D. Tenn. Nov. 7, 2017) 22

United States v. Williams,
No. ELH-11-0258, 2016 WL 3676144
(D. Md. July 7, 2016) 22, 25

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No. 16-CR-3036 (D. Neb. June 1. 2017) 15

Watson v. United States,
552 U.S. 74 (2007) 30

STATUTES

18 U.S.C. § 3553 6

18 U.S.C. § 3582(b) 12

18 U.S.C. § 3582(c) ..... *passim*

21 U.S.C. § 841(a) 18, 19

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(continued)

Page(s)

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TABLE OF AUTHORITIES
(continued)

Page(s)

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INTEREST OF AMICI CURIAE[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958 and has a nationwide membership of many thousands of direct members and up to 40,000 members when affiliates are included. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of justice. Each year, NACDL files numerous briefs as *amicus curiae* in the United States Supreme Court and other federal and state courts, seeking to provide amicus assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

The National Association of Federal Defenders ("NAFD") was formed in 1995 to enhance the represen-tation provided to indigent criminal defendants under the Criminal Justice Act, 18 U.S.C. § 3006A, and the Sixth Amendment to the United States Con-

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[1] In accordance with Supreme Court Rule 37.6, amici state that no counsel for a party authored this brief in whole or in part, and that no person or entity, other than amici and their counsel, made a monetary contribution intended to fund the preparation and submission of this brief. Both parties have indicated their consent to the filing of this brief.

stitution. NAFD is a nationwide, non-profit, volunteer organi-zation. Its membership is comprised of attorneys who work for federal public and community defender or-ganizations authorized under the Criminal Justice Act. One of the guiding principles of NAFD is to pro-mote the fair administration of justice by appearing as amicus curiae in litigation relating to criminal law issues, particularly as those issues affect indigent de-fendants in federal court. Because the attorneys making up NAFD's membership regularly negotiate and enter into plea agreements in federal criminal cases and litigate motions for sentence reductions pursuant to retroactive amendments to the United States Sentencing Guidelines, the NAFD has particu-lar expertise and interest in the issues presented in this case.

SUMMARY OF ARGUMENT

In *Freeman v. United States*, Justice Sotomayor concurred in the majority judgment, holding that a defendant who pleads guilty under Federal Rule of Criminal Procedure 11(c)(1)(C) is eligible for a sentence reduction under 18 U.S.C. § 3582(c)(2) if the agreement "expressly uses a Guidelines sentencing range to establish the term of imprisonment," or if the agreement "provide[s] for a specific term of imprisonment" and it "is evident from the agreement" that the term is based on the Sentencing Guidelines 564 U.S. 522, 539 (2011). In the wake of *Freeman*, a majority of circuits adopted the concurrence's approach. Unfortunately, in practice, searching Rule 11(c)(1)(C) agreements for proof of the parties' intent inevitably produces unpredictable, inequitable, and inconsistent results.

The results are unpredictable because eligibility for a sentence reduction now turns more on the language used in any jurisdiction's standardized plea template than on the actual intent of the parties. Parties across the country start with prosecutor-drafted documents, some of which cite the relevant Sentencing Guidelines range and criminal history category, and some of which do not. Although a criminal defendant theoretically could negotiate a plea agreement that satisfies the concurrence's test, the reality is that defendants are focused on resolving the criminal charges at issue rather than papering reliance on the Sentencing Guidelines for some distant, contingent possibility like retroactive sentence reduction.

The results are inequitable because the concurrence's test forecloses the availability of a sentence re-

duction in cases where the parties indisputably calculated the sentence "based on" the Guidelines. And vice versa; courts have been forced to consider resentencing even when the full record makes clear that a sentence was not expressly "based on" the Guidelines.

And the results are inconsistent because lower courts have reached divergent outcomes in materially-indistinguishable circumstances due to their confusion about the specificity required by the *Freeman* concurrence. Thus, the same plea agreement can make a defendant eligible for resentencing, or not, depending on where his case is heard.

Rather than looking for meaning where likely none was intended, the Court should take a more practical approach to sentence reductions. Recognizing the reality that plea agreements are always entered by reference to the Sentencing Guidelines, it should adopt a *per se* rule that defendants may take advantage of retroactive changes. That outcome would provide an easily-administrable rule and limit the confusion caused by the 4-1-4 opinions in *Freeman*.

In the past, Justices of this Court have recognized the importance of deriving a sensible, workable rule rather than leaving lower courts without guidance due to a fragmented set of opinions. *See, e.g.*, *Arizona v. Gant*, 556 U.S. 332, 352-54 (2009) (Scalia, J., concurring). And others have concluded that it sometimes makes sense to abandon minority views in favor of a majority rule that most closely accords with them. *See, e.g.*, *Alleyne v. United States*, 570 U.S. 99, 122-24 (2013) (Breyer, J., concurring in part and concurring in the judgment).

If certainty can be a controlling consideration even in some *constitutional* contexts, it is by extension proper in interpreting non-constitutional sources like statutes and Sentencing Guidelines. This is particularly so where the United States Sentencing Commission (or Congress) can always modify the rule if necessary. Criminal defendants should be eligible for sentence reduction whenever the Sentencing Guideline applicable to the conduct to which they pled is amended retroactively.

ARGUMENT

I. The *Freeman* Concurrence Leads to Unpredictable Results Because Parties Rely on the Sentencing Guidelines But Do Not Draft Plea Agreements with Retroactive Resentencing in Mind

The *Freeman* concurrence fails to provide necessary guidance in retroactive Sentencing Guideline situations because it is based on an inaccurate premise. Although the Sentencing Guidelines are always central to plea agreements, the actual agreement itself may not reflect this fact. Plea agreements typically are not negotiated with a view to preserving (or waiving) resentencing in the unlikely future event that an applicable Sentencing Guideline is amended retroactively. Attempting to derive intent where none is documented results in confusion.

A. The Sentencing Guidelines are key to all pleas because prosecutors must make them central to their decisions

As a practical matter, the Sentencing Guidelines frame every aspect of prosecutors' actions, from charging, to plea bargaining, to sentencing. Even after the

Sentencing Guidelines became advisory, *see United States v. Booker*, 543 U.S. 220 (2005), prosecutors use them as the key benchmark or touchstone for predicting and recommending punishment.

The Sentencing Guidelines' influence is evident even in the early stages of a case with initial charging decisions. Prosecutors are instructed that one of the four factors they must balance in selecting charges is that the charge "makes likely the imposition of an appropriate sentence . . . under all the circumstances of the case." U.S. Attorneys' Manual: Principles of Federal Prosecution § 9-27.430 (2017).

Practically, this reference means prosecutors must review the Sentencing Guidelines at charging. In fact, in a guidance issued just weeks after *Booker* was decided, prosecutors were explicitly reminded that they "must consult the Sentencing Guidelines at the charging stage, just as federal judges must consult the Guidelines at sentencing." Memorandum from James B. Comey to All Fed. Prosecutors, Department Policies and Procedures Concerning Sentencing 2 (Jan. 28, 2005) ("Comey Memorandum").

And if the Sentencing Guidelines are important in charging decisions, they take a heightened importance when it comes to making sentencing recommendations. As the Court has recognized, the Sentencing Guidelines remain "the starting point and the initial benchmark" for all sentencing decisions. *Gall v. United States*, 552 U.S. 38, 49 (2007).

Again the U.S. Attorneys' Manual provides clear direction: Prosecutors must "first consider whether a sentence within the advisory sentencing guidelines range" is appropriate in light of the sentencing factors

identified in 18 U.S.C. § 3553, "[t]o avoid unwanted disparities and to further the goal of uniform treatment of similarly situated defendants." U.S. Attorneys' Manual § 9-27.730(C). Prosecutors are to use the Sentencing Guidelines "as a touchstone" because the "appropriate balance of the factors set forth in [18 U.S.C.] § 3553 . . . will continue to be reflected by the applicable guideline range" in most cases. *Id.*, cmt. 1.

Not surprisingly, Attorneys General for decades—regardless of administration—have echoed the guidance that a sentence should almost always fall within the Sentencing Guidelines. Most recently, Attorney General Jeff Sessions reminded prosecutors that "[i]n most cases, recommending a sentence within the advisory guideline range will be appropriate. Recommendations for sentencing departures or variances require supervisory approval, and the reasoning must be documented in the file." Memorandum from Jeff Sessions to All Fed. Prosecutors (May 10, 2017); *see also* Memorandum from Eric H. Holder, Jr., to All Fed. Prosecutors (May 19, 2010) (similar). And earlier guidance is, if anything, more pointed. *See* Comey Memorandum at 2 ("Federal prosecutors must actively seek sentences within the range established by the Sentencing Guidelines in all but extraordinary cases.").

Plea bargaining is similarly anchored by the Sentencing Guidelines. Prosecutors are told that "[t]here are only two types of sentence bargains. . . . First, prosecutors may bargain for a sentence that is within the specified United States Sentencing Commission's guideline range. . . . Second, the prosecutor may seek to depart from the guidelines." U.S. Attorneys' Manual § 9-27.400, cmt. And prosecutors may not drop

readily-provable charges in plea bargaining absent supervisor approval unless "the applicable guideline range from which a sentence may be imposed would be unaffected." *Id.*

B. Defendants use their limited plea leverage to address pressing, current issues

From defendants' perspective, the Sentencing Guidelines are even more important. Yet defendants tend to be concerned with striking plea agreements that limit their immediate downside exposure; future contingencies like retroactive sentence reductions are secondary at best. As a practical matter, therefore, defendants do not expend their limited leverage to negotiate plea agreements that satisfy the *Freeman* concurrence's test. In light of the realities of pleas, it makes little sense to attribute intent about retroactive sentencing to the phrasing of any particular plea agreement.

1. Defendants almost universally plead guilty

The statistical reality is that defendants charged with federal crimes will be convicted in the overwhelming majority of cases. On average, some 91% of defendants charged with a federal crime will be convicted. U.S. Department of Justice, Federal Justice Statistics, 2014 – Statistical Tables, Tbl. 4.2 (2017), *available at* https://www.bjs.gov/content/pub/pdf/fjs14st.pdf.

But the number of convictions tells only part of the story. The overwhelming majority of convictions—approximately 97.5%—resulted from a guilty plea. In the entire United States, only 2.60% of cases charged

are tried, and only 0.42% result in full not guilty verdicts. *Id.* The reality is that "regardless of the prosecutor's stance in any given case, there will almost certainly be a guilty plea. . . . [F]ew defendants can afford to go to trial." Michael M. O'Hear, *Plea Bargaining and Procedural Justice*, 42 Ga. L. Rev. 407, 418 (2008).

The high rate of convictions and guilty pleas these statistics reflect are driven by a number of interrelated realities of criminal prosecution. Prosecutors have extraordinary leverage to encourage defendants to take a guilty plea. "[G]iven the array of weapons the law provides, prosecutors are often in a position to dictate outcomes, and almost always have more to say about those outcomes than do defense attorneys." William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 Harv. L. Rev. 2548, 2558 (2004); *see also* Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 Stan. L. Rev. 869, 871 (2009) (noting prosecutor power "to make charging decisions, enter cooperation agreements, accept pleas, and recommend sentences").

Some of that leverage is inherent in the structure of modern criminal law. "With the prevalence of mandatory minimum laws, a prosecutor's decision to bring or not to bring charges can dictate whether a defendant receives a mandatory five-, ten-, or twenty-year term, or whether he or she is sentenced far below that floor." *Id.* at 877. In addition, a criminal defendant who decides to go to trial faces the full range of chargeable conduct, *see Bordenkircher v. Hayes*, 434 U.S. 357 (1978) (recognizing prosecutor power to seek additional or more serious charges if defendants refuse a plea deal).

In addition to the risk of facing enhanced charges, the Sentencing Guidelines also allow prosecutors to offer defendants strong incentives to accept a plea to receive downward sentencing departures for acceptance of responsibility and substantial assistance. United States Sentencing Comm'n, *Guidelines Manual* § 3E1.1 (acceptance of responsibility); *id.* § 5K1.1 (substantial assistance). These incentives can result in significantly reduced sentences. *See* Margareth Etienne, *Remorse, Responsibility, and Regulating Advocacy: Making Defendants Pay for the Sins of Their Lawyers*, 78 N.Y.U. L. Rev. 2103, 2122 (2003).

Between prosecutors' ability to "throw the book" at defendants who insist on trial and their power to offer incentives for cooperation, defendants face significant downside risks if they do not plead. In fact, one commentator concluded that "defendants who refuse to waive their right to a jury trial receive an average sentence three times longer than those who plead." Barkow, *Institutional Design*, 61 Stan. L. Rev. at 881. As a result, prosecutors hold virtually all of the cards during the plea bargaining process.

There are, of course, some pressure points that work in defendants' favor. Prosecutors face heavy caseloads and must prioritize which cases receive time and resources. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 Harv. L. Rev. at 2554—55; *see also* Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. Chi. L Rev. 50, 54—55 (1968). A defense attorney may be able to use a prosecutor's heavy caseload successfully as leverage. *See* Rodney J. Uphoff, *The Criminal Defense Lawyer as Effective Negotiator: A Systemic Approach*, 2 Clinical L. Rev. 73, 111—12 (1995).

Nevertheless, a defendant's potential leverage points are outweighed in most instances by corresponding defense weaknesses. Some public defenders are also overburdened and unable to credibly threaten to take cases to trial. *See* Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 Harv. L. Rev. 2464, 2479 (2004). Even defendants who might initially be able to afford counsel often cannot support the mounting costs of pressing an effective defense. *See* Uphoff, *The Criminal Defense Lawyer*, 2 Clinical L. Rev. at 85. And defendants who are unable to make bail may believe that pleading guilty offers the quickest path home. *Id.* at 85—86. These factors and others mean that "[t]rial looks worse than it really is, and so the plea looks relatively better." Richard Birke, *Reconciling Loss Aversion and Guilty Pleas*, 1999 Utah L. Rev. 205, 247 (1999).

2. Defendants who plead prioritize current issues over uncertain future eventualities like retroactive Sentencing Guidelines

In most cases, therefore, the question for defendants is not whether they will avoid conviction; it is what penalties will be imposed. "[C]riminals face the choice of accepting a certain loss of liberty or property or taking a risk and going to trial. In the vast majority of cases, defendants accept the certain loss." Birke, *Reconciling Loss Aversion*, 1999 Utah L. Rev. at 207; *see also* Bibas, *Outside the Shadow of Trial*, 117 Harv. L. Rev. at 2496-2519 (discussing competing pressures faced by defendants considering whether to plead). As the Court has recognized, this means that "[i]n today's criminal justice system . . . the negotiation of a plea bargain, rather than the unfolding of a trial, is almost

always the critical point for a defendant." *Missouri v. Frye*, 566 U.S. 134, 144 (2012).

But the same realities that result in near-universal guilty pleas mean that most defendants facing charges have severely limited negotiating power. Criminal defendants (and defense lawyers) must therefore decide which aspects of a plea bargain to prioritize during plea negotiations.

In assessing what to prioritize, the possibility of retroactive sentence reduction is slight. By their nature, retroactive changes to the Sentencing Guidelines are future, contingent events. Criminal sentences, including sentences imposed pursuant to plea agreements, are generally final. *See* 18 U.S.C. § 3582(b) ("a judgment of conviction that includes . . . a sentence constitutes a final judgment"); *see also* 18 U.S.C. § 3582(c) (court generally "may not modify a term of imprisonment once it has been imposed"). As a result, a defendant who pleads guilty will in most instances never have any argument for resentencing.

The limited exception of a retroactive change in the applicable Sentencing Guideline is doubly contingent on future events outside the defendant's control. *See* 18 U.S.C. § 3582(c)(2). The United States Sentencing Commission has the responsibility for promulgating amendments as warranted. *See* 28 U.S.C. § 994(o). But such amendments generally "will be given prospective application only." U.S. Sent. Comm'n, Rules of Prac. & Proc. Rule 4.1A, https://www.ussc.gov/sites/default/files/pdf/amendment-process/2016practice_procedure.pdf.

In order for an amendment to have retroactive effect, Rule 4.1A requires additional process. The Commission must (1) agree to request public comment on retroactivity; (2) instruct staff to prepare a retroactivity analysis and make it available to Congress and the public; (3) hold a public hearing about retroactivity; and (4) take a public vote on retroactivity at least 60 calendar days before the effective date. *Id.*

In other words, "[a] court's [resentencing] power under § 3582(c)(2) . . . depends in the first instance on the Commission's decision not just to amend the Guidelines but to make the amendment retroactive." *Dillon v. United States*, 560 U.S. 817, 826 (2010). Any defendant who is incentivized to reach a plea agreement is unlikely to use his limited negotiating capital for a provision in the agreement that relies on two separate, subsequent, and future decisions by a third party.

C. Rule 11(c)(1)(C) plea agreements differ by jurisdiction

The *Freeman* concurrence applies a uniform rule for 18 U.S.C. § 3582(c)(2) sentence reductions in all cases involving Rule 11(c)(1)(C) plea agreements. But it ignores the reality that there is nothing like a standard template for plea agreements among the various U.S. Attorneys' Offices, either in general or for Rule 11(c)(1)(C) plea agreements. Parties across the country start with prosecutor-drafted documents that vary by district (and potentially even by prosecutor) and then negotiate terms from there. This fact means that the application of *Freeman* depends in the first instance on the happenstance of geography.

A sampling of Rule 11(c)(1)(C) plea agreements across the country illustrates the degree to which they diverge from each other. Some plea agreements meticulously cite relevant portions of the Sentencing Guidelines and criminal history in explanation of a plea, while others fail to mention them altogether. Still others fall somewhere along the spectrum. The end result is that defendants' successes or failures when seeking retroactive sentence reductions under *Freeman* at some later date depend largely on the specificity of the plea template for that jurisdiction. Ultimately, this means that defendants may obtain (or be denied) retroactive resentencing under *Freeman* simply because of where they are located.

First, some plea agreements lay out a full calculation, citing the corresponding Sentencing Guideline for each factor relevant to the sentence and providing a criminal history score. For example, a plea agreement entered in a prosecution for possession of heroin with intent to distribute in the Western District of New York explicitly cited the Sentencing Guidelines for each offense characteristic. Plea Agreement at 4-5, *United States v. Brooks*, No. 6:15-CR-6157 (W.D.N.Y. Nov. 17, 2017), ECF No. 119. It listed the requisite offense level adjustments for possessing a firearm and maintaining premises to manufacture or distribute a controlled substance. *Id.* It cited the Sentencing Guidelines relevant to defendant's criminal history level and acceptance of responsibility. *Id.* Based on these factors, it calculated a sentencing range of 41 to 51 months and ultimately recommended a sentence of 51 months, at the top of that range. *Id.* at 5. The plea was structured throughout by reference to the Sentencing Guidelines. In plea agreements like

this, there should be no doubt that the sentences adopted by the court are "based on" the Guidelines.[2]

At the other end of the spectrum, some Rule 11(c)(1)(C) plea agreements say little, if anything, about the Sentencing Guidelines considerations that inform the sentencing stipulation the parties have reached. These pleas simply state that the parties consider the sentence "appropriate" given the facts, sometimes with a reference to acceptance of responsibility.

For example, a Rule 11(c)(1)(C) plea agreement for distribution of fentanyl resulting in serious bodily injury in the Eastern District of Kentucky recommended a sentence of 300 months imprisonment, 15 years of supervised release, and $100 in special assessment. *See* Plea Agreement at 3, *United States v. Dudley*, 15-CR-34 (E.D. Ky. Oct. 27, 2016), ECF No. 180. The plea agreement provided no explanation of how the parties reached the calculation. In agreements like this, it is likely that a court applying the *Freeman* concurrence would conclude that retroactive sentence reduction was unavailable if the applicable Sentencing Guidelines were to change.[3]

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[2] *See also* Plea Agreement, *United States v. Burns*, No. 17-CR-60 (C.D. Cal. Feb 2, 2017), ECF No. 8; Plea Agreement, *United States v. Blackshell*, No. 17-CR-6133 (W.D. N.Y. Nov. 3, 2017), ECF No. 34; Plea Agreement, *United States v. Feiten*, No. 15-CR-20631 (E.D. Mich. May 25, 2016), ECF No. 35; Plea Agreement, *United States v. Hopson*, No. 12-CR-444 (D. Colo. Sept. 29, 2014), ECF No. 115; Plea Agreement, *United States v. Shields*, No. 16-CR-12 (E.D. Wash. May 24, 2016), ECF No. 43.

[3] *See also* Plea Agreement, *United States v. Gray*, No. 15-CR-58 (E.D. Tex. July 8, 2016), ECF No. 185; Plea Agreement, *United States v. Harper*, No. 15-CR-155 (D. Kan. Mar. 9, 2016),

Still other plea agreements fall somewhere in the middle of this spectrum, spelling out only some of the Sentencing Guidelines considerations or doing so in general terms only. Some include complete calculations of the Sentencing Guidelines offense level but lack a criminal history score to be complete. For instance, the Rule 11(c)(1)(C) plea in *United States v. Garcia* provided a specific, agreed Sentencing Guidelines calculation resulting in a total offense level of 19. Plea Agreement at ¶12, *United States v. Garcia*, No. 13-CR-462 (C.D. Cal. July 3, 2013), ECF No. 13. The agreement did not, however, provide a criminal history score or a specific sentence or range; instead the parties agreed that the court would calculate criminal history and agreed to sentencing at the bottom of the resulting Sentencing Guidelines range. *Id.* at ¶13. Still other agreements provide a full offense level calculation but no criminal history score, yet then provide a recommended sentencing range or term.[4]

ECF No. 28; *United States v. Peters*, No. 16-CR-315 (D. Neb. Nov. 8, 2016), ECF No. 9; Plea Agreement, *United States v. Portorreal*, No. 16-CR-210 (E.D. Va. Oct. 20, 2016), ECF No. 18; Plea Agreement, *United States v. Wrightsell*, No. 16-CR-3036 (D. Neb. June 1, 2017), ECF No. 28.

[4] *See* Plea Agreement at 4-6, *United States v. Biddy*, No. 17-CR-40011 (D. Mass. May 16, 2017), ECF No. 31 (providing offense level calculation but not criminal history and recommending range); Plea Agreement at 3-4, *United States v. Cornwell*, No. 16-MJ-29 (W.D. Ky. July 19, 2016), ECF No. 14 (same; recommended term); Plea Agreement at 6-8, *United States v. Cuff*, No. 15-CR-110 (E.D. Wash. Oct. 28, 2015), ECF No. 16 (same; recommended range); Plea Agreement at 2-3, *United States v. Molina*, No. 17-CR-40012 (D. Mass. April 26, 2017), ECF No. 7 (same; recommended term); No. 6 (same; recommended term); Plea Agreement at 2-3, *United States v. Rafal*, No. 17-CR-10004 (D.

And then there are agreements that state that the parties considered the Sentencing Guidelines in some fashion, including citations to the Sentencing Guidelines in other portions of the agreement or stating that the Sentencing Guidelines apply generally. But they do not explicitly calculate an offense level or tie it to the recommended sentence.

For example, in *United States v. Marple* the parties entered a Rule 11(c)(1)(C) plea agreement for distribution of heroin and aiding and abetting. Plea Agreement at 1, *United States v. Marple*, No. 14-CR-35 (W.D. Va. Feb. 11, 2015) ECF No. 47. The agreement recommended a 114-month sentence. *Id.* at 3. It noted that the "2014 edition of the United States Sentencing Guidelines Manual applies to any guideline calculations made of [defendant's] conduct." *Id.* However, when providing the recommended sentence, the agreement did not cite specific Sentencing Guidelines in support. Rather, it merely stated the sentence was a "reasonable sentence under all the facts and circumstances of this case." *Id.* at 2.[5]

Mass. Nov. 29, 2016), ECF No. 6 (same; recommended term); Plea Agreement at 6-8, *United States v. Slatt*, No. 16-CR-51 (E.D. Wash. Nov. 9, 2016), ECF No. 51 (same; recommended term).

[5] *See also* Plea Agreement at 2, 5-6, *United States v. Anderson*, No. 16-CR-33 (M.D. Ga. Aug. 23, 2017) (general agreement Sentencing Guidelines apply, acceptance of responsibility, and recommended term); Plea Agreement at 7-8, 10, *United States v. Baldwin*, No. 13-CR-248 (M.D. Pa. Sept. 29, 2014), ECF No. 33 (general agreement Sentencing Guidelines apply, acceptance of responsibility, and recommended term); Plea Agreement at 3-4, *United States v. Clements*, No. 14-CR-21 (W.D. Va. May 21, 2014), ECF No. 29 (general agreement Sentencing Guidelines apply, partial offense level calculation, and recommended range); Plea Agreement at 1, 5-6, *United States v.*

In sum, Rule 11(c)(1)(C) plea agreements exhibit a spectrum of specificity in their reliance on the Sentencing Guidelines. Some are chapter-and-verse recitations of the parties' agreement that show the work done; others provide half the calculation, and still others simply give the sentencing conclusion with little else. There is nothing approaching standardization.

D. Variations in plea agreements lead to different resentencing outcomes for similarly-situated defendants

The diversity of approaches used in different plea agreements has real-world consequences for applying *Freeman*. Defendants charged with similar crimes in different jurisdictions have entirely different plea agreements that could impact their chances of receiving retroactive resentencing if their applicable Sentencing Guidelines changed.

For example, compare the plea agreements in *United States v. Brooks* and *United States v. Marple*. Both defendants were charged under 21 U.S. § 841(a), Brooks for possession of heroin with intent to distribute and Marple for distribution of heroin. *See* Plea Agreement at 4-5, *Brooks*, No. 6:15-CR-6157; Plea Agreement at 1, *Marple*, No. 14-CR-35. However, the *Brooks* Rule 11(c)(1)(C) plea agreement drafted in the Western District of New York directly cites the Sentencing Guidelines in support of the recommended sentence. Plea Agreement at 4-5, *Brooks*, No. 6:15-CR-6157. In contrast, the *Marple* Rule 11(c)(1)(C) plea agreement, from the Western District of Virginia

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Fackrell, No. 12-CR-33 (M.D. Pa. Feb. 15, 2012), ECF No. 3 (general agreement Sentencing Guidelines apply, acceptance of responsibility, and recommended range).

states that the Sentencing Guidelines apply generally but does not detail whether the recommended sentence was calculated using them. Plea Agreement at 1, *Marple*, No. 14-CR-35.

Similarly, compare *United States v. Dudley* and *United States v. Espola*. Both defendants were charged under 21 U.S. § 841(a) for the distribution of Schedule II controlled substances, and both entered Rule 11(c)(1)(C) pleas. *See* Plea Agreement at 3, *Dudley*, No. 15-CR-34 (E.D. Ky. Oct. 27, 2016) ECF No. 180; Plea Agreement at 2, *United States v. Espola*, No. 17-CR-40023 (D. Mass. May 17, 2017). The plea agreement in *Dudley*, from the Eastern District of Kentucky, does not mention the Sentencing Guidelines at all. Plea Agreement at 3, *Dudley*, No. 15-CR-34. In contrast, Espola's plea agreement, from the District of Massachusetts, specifically cites the base offense level from the Sentencing Guidelines, though it does not include a criminal history score. Plea Agreement at 2, *Espola*, 17-CR-40023.

It is, of course, possible that the distinctions between different plea agreements were the result of negotiations between the parties. But there is no indication that such negotiations account for the distinctions between plea agreements in various jurisdictions. The reality is that each jurisdiction tends to have a boilerplate style of Rule 11(c)(1)(C) plea agreement, and parties' negotiations take place against the backdrop of standard local practice. *Compare, e.g.*, Plea Agreement, *United States v. Biddy*, No. 17-CR-40011 (D. Mass. May 16, 2017) ECF No. 31, *with* Plea

Agreement, *Espola*, No. 17-CR-40023 (similar language throughout both Rule 11(c)(1)(C) pleas).[6] These similarities suggest that attributing significance to the wording of a particular Rule 11(c)(1)(C) plea is actually penalizing or rewarding defendants for the form of the document that they happen to sign. Eligibility for resentencing should not turn on the quirk of which template a particular office or prosecutor happens to use.

II. The *Freeman* Concurrence Leads to Inequitable Results Because Eligibility for Resentencing Does Not Necessarily Reflect the Parties' Actual Intent

Another challenge with the *Freeman* concurrence is that it examines only the language of the plea agreement. Courts must therefore disregard oral statements made at sentencing, even when such statements may provide near-definitive evidence that the agreement was (or was not) *actually* "based on" the Sentencing Guidelines. As a result, even those courts that have attempted to apply the *Freeman* concurrence's rule faithfully recognize that it can lead to incorrect results.

The Seventh Circuit's decision in *United States v. Dixon*, 687 F.3d 356 (7th Cir. 2012), is a particularly direct example. During the Rule 11(c)(1)(C) plea col-

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[6] *Compare also, e.g.*, Plea Agreement, *Burns*, No. 17-CR-60, *with* Plea Agreement, *Garcia*, No. 13-CR-462 (similar base documents); Plea Agreement, *Slatt*, No. 16-CR-51, *with* Plea Agreement, *Cuff*, No. 15-CR-110 (similar base documents, even though child pornography and illegal firearms dealing at issue are very different).

loquy, the prosecutor identified the applicable Guideline range for the court and explained that the proposed sentence was one-half to two-thirds of the low end of that range. *Id.* at 360. But in subsequent proceedings regarding retroactive application of an amended Sentencing Guideline, the Court determined that it could not consider the prosecutor's statements because they were oral and not reflected in the plea agreement. *Id.* at 361.

The Seventh Circuit strongly questioned this result. It stated that "[i]t is hard to believe that [the prosecutor's] assurances were not relevant, perhaps even decisive, in the judge's decision to accept the binding plea agreement." *Id.* It recognized that "[i]f the written agreement itself had said what the prosecutor told the court . . . the district court could have exercised its discretion to decide to grant or deny" resentencing. *Id.* at 360-61. Yet, the *Freeman* concurrence compelled it to conclude that the sentence was not "based on" the Guidelines.

In a similar case from the Sixth Circuit, the prosecutor orally specified the defendant's offense level, criminal history category, and the applicable Guideline range for the court, explaining that the agreed Rule 11(c)(1)(C) sentence reflected a three level reduction for acceptance of responsibility and assisting law enforcement. *United States v. McNeese*, 819 F.3d 922, 925 (6th Cir. 2016).

The Sixth Circuit recognized that "the prosecutor's remarks at the sentencing hearing–together with the pre-sentence report . . . make clear that by the end of the sentencing hearing, McNeese, the government, and the district court all understood that the agreed-upon sentence did in fact derive from a Guidelines

sentencing range." *McNeese*, 819 F.3d at 929. However, since the plea agreement itself did not reflect this clear understanding, the Sixth Circuit held that the defendant was ineligible for a sentence reduction. *Id.* at 930.

These are not isolated results. *See also, e.g.*, *United States v. Castenada*, No. 2:13-CR-74, 2017 WL 5178785 at *4 (E.D. Tenn. Nov. 7, 2017) (parties agreed on Guideline range and discussed the criminal history category at sentencing; sentence reduction nevertheless denied because statements not in plea agreement); *United States v. Williams*, No. 2:13-CR-34, 2017 WL 5178755 at *2, 4 (E.D. Tenn. Nov. 7, 2017) ("[h]ow the Court was to get from level 28 to a sentence of 90 months was certainly clear after receiving the PSR and hearing the arguments of counsel at the sentencing hearing," but refusing sentence reduction because plea was not "based on" Sentencing Guidelines); *United States v. Heard*, 859 F. Supp. 2d 97, 101 (D.D.C. 2012) (same; Sentencing Guidelines ranges discussed); *United States v. Williams*, No. ELH-11-0258, 2016 WL 3676144 at *2-3 (D. Md. July 7, 2016) (same; noting prohibition on considering express prosecutor statement that plea was for low end of Sentencing Guideline range). Courts applying the *Freeman* concurrence sometimes have to close their eyes to the reality of what the parties actually intended.

And the *Freeman* concurrence does not only lead to defendants being denied resentencing in spite of clear evidence that they are eligible to receive it. Courts have also been forced to consider whether to *grant* a sentence reduction even when the full record made clear that a sentence was *not* expressly "based on" the Sentencing Guidelines. In *United States v. McCall*,

for instance, both parties agreed at sentencing that they miscalculated the Sentencing Guideline range included in the Rule 11(c)(1)(C) plea agreement. 649 F. App'x 114 (2d Cir. 2016). The plea's proposed sentence was 108 months, but the correct Sentencing Guideline range should have been 121-151 months. *Id.* at 116.

Nevertheless, the district court accepted the plea, concluding that it was "a reasonable sentence, even though it's not a guideline sentence." *Id.* However, on the defendant's subsequent motion to reduce his sentence, the same defendant received relief because the plea contained a Sentencing Guideline calculation, even though that calculation was undisputedly incorrect and was not the basis for the sentence imposed. As the Sixth Circuit explained, "[n]otwithstanding the court's decision to sentence McCall based on an erroneous Guidelines calculation . . . *Freeman* requires him to be resentenced." *McCall*, 649 F. App'x at 116.

A similarly odd outcome occurred in *United States v. George*, where the parties calculated a higher-than-warranted Sentencing Guideline range and included it in the plea. *United States v. George*, 664 F. App'x 465, 467 (6th Cir. 2016). The defense attorney noted at sentencing that the parties had "bargained for a sentence . . . not for a Guideline range." *Id.* Notwithstanding that disclaimer, the defendant later was held eligible for a sentence reduction because the (erroneous) Sentencing Guideline calculation was included in the plea agreement. *See also United States v. Smith*, 658 F.3d 608, 612-13 (6th Cir. 2011) (defendant eligible for sentence reduction where complete guidelines worksheet attached to plea agreement, even though defense attorney at sentencing stated that sentence

was not based on sentencing guidelines). These cases illustrate that defendants whose sentences were not actually "based on" the Sentencing Guidelines nevertheless have been deemed eligible for a sentence reduction under a faithful application of the concurring opinion in *Freeman*.

In sum, because courts applying the *Freeman* concurrence may look only to the four corners of the plea agreement, they can be forced to make sentence reduction eligibility decisions that do not reflect reality. In this way, *Freeman* is both over- and under-inclusive. Some defendants whose pleas actually were "based on" the Sentencing Guidelines are not eligible for a sentence reduction under *Freeman*, while some defendants whose pleas were not "based on" the Sentencing Guidelines are treated as if they were.

III. The *Freeman* Concurrence Leads to Inconsistent Results for Defendants with Similar Plea Agreements Because There is Confusion About the Level of Specificity Required

The *Freeman* concurrence also leads to inconsistent determinations regarding eligibility for a retroactive sentence reduction because defendants with similar plea agreements can receive different relief based on the court in which their case was heard.

There is confusion about the specificity required in a plea agreement in order for the *Freeman* concurrence to allow resentencing. For instance, the Sixth Circuit requires the Sentencing Guideline range to be "*explicitly* referenced" in the plea agreement. *McNeese*, 819 F.3d at 927. The Seventh Circuit similarly explains that the plea agreement must refer to

and rely on or "expressly use" a Sentencing Guideline range. *Dixon*, 687 F.3d at 360.

Other courts, however, appear less demanding. The Third Circuit allows sentence reductions if the plea agreement contains the "necessary ingredients" to calculate the defendant's Guideline range, even if that range is not explicitly expressed. *United States v. Weatherspoon*, 696 F.3d 416, 424 (3d Cir. 2012). The First and Tenth Circuits also accept this inferential approach. *See United States v. Jordan*, 853 F.3d 1334, 1340 (10th Cir. 2017) (plea agreement need not specify the Guideline range and can instead call for a specific term of imprisonment); *United States v. Rivera-Martinez*, 665 F.3d 344, 349 (1st Cir. 2011) (same).

These different approaches matter. For example, two Rule 11(c)(1)(C) plea agreements that expressly stated that the Sentencing Guidelines applied, included the defendant's offense level, and stipulated a specific term of imprisonment had different outcomes in different jurisdictions. *Compare United States v. Adams*, No. 6:11-CR-00040-GFVT-HAI-1, 2017 WL 3701444 at *3 (E.D. Ky. Aug. 28, 2017), *with Williams*, 2016 WL 3676144 at *5. Both plea agreements also included express disclaimers that there was no agreement about the defendant's criminal history category. *See Adams*, 2017 WL 3701444 at *3; *Williams*, 2016 WL 3676144 at *1, 4.

The *Adams* court held the defendant ineligible for a sentence reduction because there was no calculation of the applicable Guideline range or criminal history score in the plea. *See* 2017 WL 3701444 at *3-4. The *Williams* court, however, ascribed significance to the plea agreement's statement that the "'Advisory Sentencing Guidelines Apply'" and inferred from the

agreed-upon sentence that the parties must have assumed a criminal history category of I. *See* 2016 WL 3676144 at *5 ("it certainly appears that the parties anticipated the criminal history category of I"). The court therefore allowed a sentence reduction.

The defendant in *United States v. Graham* was similarly fortunate to be in Massachusetts instead of somewhere else. 869 F. Supp. 2d 208 (D. Mass. 2012). The defendant was initially subject to a mandatory minimum of 60 months, but the government filed an information that would have carried a mandatory minimum of 120 months. *Id.* at 210. The Rule 11(c)(1)(C) plea agreement reflected both minimums and a government agreement to withdraw the information in return for an agreed 90-month sentence. *Id.* It did not, however, expressly specify how the parties reached 90 months. *Id.*

The court nevertheless held the defendant eligible for a sentence reduction when the relevant Sentencing Guidelines changed. It recognized that "the process appeared transparently Solomonic: the parties halved the difference." *Id.* Under those circumstances, the court concluded that it was "abundantly clear from the four corners of the document" that "the agreement simply split the difference" between the two potential Sentencing Guidelines terms. *Id.* at 214.

But that inferential approach appears improper under, for instance, either *Dixon*, 687 F.3d at 360, or *McNeese*, 819 F.3d at 928 ("It is surely possible that one could guess" what sentencing range applied but rejecting the invitation to do so). Either of those courts would have denied resentencing because an inference was required.

Uncertainty about the *Freeman* concurrence has led courts to adopt different requirements for defendants' plea agreements. The consequence of these varied approaches is that the principal factor determining whether a defendant qualifies for retroactive sentence reduction may not actually be whether the agreement was "based on" the sentencing Guidelines. This variation results in inconsistent outcomes based on the geographic happenstance of the approach taken by a particular court.

IV. *Freeman* Should Be Modified to Provide a Clear, Administrable Rule

Rather than attempting to discern intent from the four corners of a plea agreement or even from the record as a whole, the Court should modify *Freeman* to provide a clear, administrable rule. Such a rule should recognize the practical reality that *all* federal plea agreements are influenced by and based on the Sentencing Guidelines. The practical need to avoid confusion has caused Justices in similar instances to adopt easy-to-apply rules, and criminal resentencing should be no different. In fact, the Sentencing Guidelines are particularly appropriate for a rule that allows resentencing, since the United States Sentencing Commission (or Congress, for that matter) can always provide that a particular Sentencing Guideline change is not appropriate for retroactive application.

A. Justices have recognized the importance of clear, administrable rules rather than creating 4-1-4 split decisions

There is nothing unusual about the Court prioritizing the creation of a clear, administrable rule over a split decision that will continue to cause confusion in

the lower courts. In other cases Justices of the Court have recognized the need to provide clear guidance by adopting clear rules, even in constitutional decisions when they would have preferred a different outcome.

For instance, in *Arizona v. Gant*, the Court addressed ongoing confusion regarding the circumstances under which police officers could conduct a warrantless search of a vehicle incident to arrest of its occupant. 556 U.S. at 335. Justice Stevens wrote the majority opinion for five Justices, clarifying several prior cases to explain that the Fourth Amendment allows such a search "only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest." *Id.* at 351.

Justice Scalia provided the fifth vote for that majority opinion. *See id.* at 354 (Scalia, J., concurring) ("I . . . join the opinion of the Court."). Critically, he did not believe that Justice Stevens' opinion stated the right rule for Fourth Amendment purposes. *Id.* at 352. Instead, he would have preferred a rule limited to Justice Stevens' second exception for evidence of the offense of arrest. *Id.* at 353 ("I would hold that a vehicle search incident to arrest is *ipso facto* 'reasonable' only when the object of the search is evidence of the crime for which the arrest was made, or of another crime that the officer has probable cause to believe occurred.").

Nevertheless, Justice Scalia recognized that "[n]o other Justice . . . shares my view." *Id.* at 354. That fact left the Court facing the prospect of a "4–to–1–to–4 opinion that leaves the governing rule uncertain," a result that Justice Scalia termed "unacceptable." *Id.*

Rather than leave lower courts without guidance (as well as citizens and police officers literally standing by the side of the road), Justice Scalia adopted what he saw as the lesser evil: He provided the fifth vote to Justice Stevens' opinion. *Id.*

Nor is Justice Scalia alone. Just a few years later, Justice Breyer provided the fifth vote in *Alleyne v. United States*, 570 U.S. 99, to overturn a prior case, *Harris v. United States*, 536 U.S. 545 (2002), that had allowed judicial factfinding to increase mandatory minimum sentences for crimes in spite of Sixth Amendment concerns. *See Alleyne*, 570 U.S. at 117.

Although Justice Breyer dissented in the underlying case of *Apprendi v. New Jersey*, 530 U.S. 466, 555 (2000) (Breyer, J., dissenting), which required any fact (other than recidivism) that increased the penalty for a crime to be found by a jury, *id.* at 490 (maj. op.), he nevertheless believed that it was "highly anomalous" to apply *Apprendi* to prohibit judicial factfinding that *raised* the maximum sentence while nevertheless allowing judicial factfinding that imposed a mandatory minimum sentence. *See Alleyne*, 570 U.S. at 122-23 (Breyer, J., concurring in part and concurring in the judgment).

Like Justice Scalia in *Gant*, Justice Breyer explained that his "minority views" should give way to the need for consistency. *Id.* at 123. But pragmatism was not his only reason. Justice Breyer also looked back to the policies animating the Sixth Amendment concerns at issue and concluded that the majority better accounted for them than the dissent. *Id.* (rejecting the dissent's characterization of the Sixth Amendment "as simply seeking to prevent 'judicial overreaching'" in sentencing as insufficient because of the

additional concern of protecting "defendants against 'the wishes and opinions of the government' as well").

And more broadly, a number of Supreme Court Justices have recognized the propriety of revisiting their initial views of an issue after the opportunity for further reflection. *See, e.g.*, *United States v. Gooding*, 25 U.S. 460, 478 (1827) (Story, J.); *Massachussetts v. United States*, 333 U.S. 611, 639-40 (1948) (Jackson, J., dissenting); *Henslee v. Union Planters Nat'l Bank & Trust Co.*, 335 U.S. 595, 600 (1949) (Frankfurter, J., dissenting); *Ring v. Arizona*, 536 U.S. 584, 614 (2002) (Breyer, J., concurring in the judgment) (quoting Frankfurter's *Henslee* dissent); *Watson v. United States*, 552 U.S. 74, 84 (2007) (Ginsburg, J., concurring in the judgment) (same); *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2793 n.11 (2014) (Ginsburg, J., dissenting) (quoting Jackson's *Mass* dissent); *Dart Cherokee Basin Op. Co., LLC v. Owens*, 135 S. Ct. 547, 561-62 (2014) (Scalia, J., dissenting) (same); *see also* Adam Liptak, *Supreme Court Justices Admit Inconsistency, and Embrace It*, The New York Times at A18 (Dec. 23, 2014).

These Justices' pragmatic recognition—at times in constitutional cases, no less—of the propriety of change is instructive in the present case. As illustrated previously, *see ante* Parts I.C, I.D, II & III, lower courts, criminal defendants, and prosecutors are in precisely the sort of "unacceptable . . . 4–to–1–to–4" situation post-*Freeman* that Justice Scalia voted to avoid in *Gant*. 556 U.S. at 354. In this same spirit, this Court has an opportunity to provide much-needed guidance regarding the availability of resentencing in the Rule 11(c)(1)(C) context.

B. The proper rule is for all Rule 11(c)(1)(C) defendants to be resentenced when a guidelines range implicated by their plea is amended retroactively

Rather than attempt to clarify a rule that leaves lower courts puzzling through documents in search of a meaning that may not be clearly articulated, the Court should adopt a *per se* rule that all defendants sentenced pursuant to Rule 11(c)(1)(C) plea agreements may be resentenced under 18 U.S.C. § 3582(c)(2) when the Sentencing Guidelines applicable to their underlying crime are modified retroactively. Such a rule would reflect the realities of the criminal justice system and plea bargaining. The Sentencing Guidelines are always implicated in a plea bargain. Rule 11(c)(1)(C) agreements are no exception.

The Court should not condition resentencing eligibility on the happenstance of largely boilerplate plea agreements. Nor should it attempt to derive meaning where none may exist. If the United States Sentencing Commission believes a Sentencing Guideline must be amended and makes the additional determination that the amendment should be retroactive, defendants should receive the benefit of that amendment. In this way, the resources that are presently invested litigating a cold plea record to determine whether a sentence reduction is available can be better spent on the work of assigning a new sentence that reflects the objectives under the retroactively-reduced Sentencing Guideline.

C. Congress or the United States Sentencing Commission can always revise this rule if desired

Finally, there is a low risk of undesirable consequences from adopting a rule that all Rule 11(c)(1)(C) defendants are eligible for a sentence reduction when the guidelines implicated by their plea are amended retroactively. There are at least three reasons why a rule in favor of retroactivity would cause no lasting harm.

First, Congress always retains the power to modify § 3582(c)(2) if it believes that an "express statement" rule is required. *See, e.g.*, *Swift & Co. v. Wickham*, 382 U.S. 111, 133-34 (1965) (Douglas, J., dissenting) ("An error in interpreting a federal statute may be easily remedied. If this Court has failed to perceive the intention of Congress, or has interpreted a statute in such a matter as to thwart the legislative purpose, Congress may change it."); *Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235, 260 n.* (1970) (Black, J., dissenting) (same).

Second, the Sentencing Commission can refuse retroactive resentencing in its discretion for any amendment to the Sentencing Guidelines. *See* U.S. Sent. Comm'n, Rules of Prac. & Proc. Rule 4.1A,. Thus, retroactive resentencing can occur—regardless of this Court's decisions—only when the Sentencing Commission believes it warranted.

Finally, even in a situation where the Sentencing Commission believes retroactive application of an amendment is warranted, it could adopt a specific guidance for Rule 11(c)(1)(C) pleas if it believed there was some reason they should be treated differently. A

court would have to consider such guidance under the federal resentencing statute, which states that a district court must consider whether "a reduction is consistent with applicable policy statements issued by the Sentencing Commission." 18 U.S.C. § 3582(c)(2). Any of these alternative methods likely would produce practical direction tailored to the particular facts of a retroactivity decision, rather than forcing courts to attribute meaning to the random happenstance of a likely boilerplate plea agreement.

CONCLUSION

The judgment of the court of appeals should be reversed.

JANUARY 29, 2018

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No. 17–155

In the Supreme Court of the United States

ERIK LINDSEY HUGHES,
Petitioner,

v.

UNITED STATES,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
For the Eleventh Circuit

BRIEF OF PROFESSOR RICHARD M. RE AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

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QUESTION PRESENTED

Whether this Court should abandon the *Marks* rule, which provides:

> When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.

Marks v. United States, 430 U.S. 188, 193 (1977) (internal quotation marks and citation omitted).

TABLE OF CONTENTS

QUESTION PRESENTED i
TABLE OF AUTHORITIES iii
INTEREST OF THE *AMICUS CURIAE* 1
SUMMARY OF ARGUMENT 1
ARGUMENT 4
I. A Precedent of This Court Should Form Only When a Majority of the Court Agrees on a Rule of Decision 4
II. The Parties' Proposed Versions of the *Marks* Rule Are Objectionable 7
A. The Logical-Subset Test Rests on a Logical Fallacy 7
B. The Convergent-Results Test Treats Outlier Views as Precedential 11
III. Stare Decisis Should Not Protect the *Marks* Rule 13
CONCLUSION 18

TABLE OF AUTHORITIES

Cases

AFTG-TG, LLC v. Nuvoton Tech. Corp., 689 F.3d 1358 (Fed. Cir. 2012) 17

Arizona v. Gant, 556 U.S. 332 (2009) 7

Baldasar v. Illinois, 446 U.S. 222 (1980) 17

Baze v. Rees, 553 U.S. 35 (2008) 6

Crawford v. Washington, 541 U.S. 36 (2004) 15

Dennis v. United States, 341 U.S. 494 (1951) 8

E.I. du Pont de Nemours & Co. v. Train, 430 U.S. 112 (1977) 13

Freeman v. United States, 564 U.S. 522 (2011) ..... passim

Garland v. Roy, 615 F.3d 391 (5th Cir. 2010) 16

Glossip v. Gross, 135 S. Ct. 2726 (2015) 6

Gregg v. Georgia, 428 U.S. 153 (1976) 4, 14

Grutter v. Bollinger, 288 F.3d 732 (6th Cir. 2002) 14

Grutter v. Bollinger, 539 U.S. 306 (2003) ..... passim

J. McIntyre Machinery, Ltd. v. Nicastro, 564 U.S. 873 (2011) 16, 17

King v. Palmer, 950 F.2d 771 (D.C. Cir. 1991) 8, 9, 10, 12

Marks v. United States, 430 U.S. 188 (1977) ..... passim

McDonald v. City of Chicago, Ill., 561 U.S. 742 (2010) 17

Memoirs v. Massachusetts, 383 U.S. 413 (1966) 9, 10

Missouri v. Seibert, 542 U.S. 600 (2004) 16

Nichols v. United States, 511 U.S. 738 (1994) 3, 15, 17

Payne v. Tennessee, 501 U.S. 808 (1991). . 3, 13, 14, 16

Pearson v. Callahan, 555 U.S. 223 (2009) 14

Rapanos v. United States, 553 U.S. 507 (2008) 16, 17

Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1972) 12, 17

Riley v. California, 134 S. Ct. 2473 (2014) 12

Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989) 13

State v. Norton, 443 Md. 517 (2015) 17

Time, Inc., v. Hill, 385 U.S. 374 (1967) 10

United States v. Bailey, 571 F.3d 791 (8th Cir. 2009) 17

United States v. Davis, 825 F.3d 1014 (9th Cir. 2016) 8, 10, 11, 15

United States v. Epps, 707 F.3d 337 (D.C. Cir. 2013) 8

United States v. Jones, 565 U.S. 400 (2012) 12

United States v. Lipar, 665 Fed. App'x 322 (5th Cir. 2016) 16

United States v. Ray, 803 F.3d 244 (6th Cir. 2015) 16

United States v. Santos, 553 U.S. 507 (2008) 16

Williams v. Illinois, 567 U.S. 50 (2012) 16, 17

Other Authorities

Brief In Opposition 11

Petition 7, 11, 13

Petitioner's Brief 7, 13

Scholarly Sources

AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY (2012) 14

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INTEREST OF THE *AMICUS CURIAE*[1]

Richard M. Re is Assistant Professor of Law at the UCLA School of Law. The interest of amicus is the sound development of precedential law. This Brief draws on the amicus's article, *Beyond the* Marks *Rule*, *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3090620 (hereinafter *Beyond* Marks).

SUMMARY OF ARGUMENT

1. A precedent of this Court should form only when most Justices expressly agree on a rule of decision. That simple majority rule has several advantages over the *Marks* rule. First, the majority rule would ensure that outlier views are not transformed into binding, nationwide precedents. By contrast, the *Marks* rule systematically privileges outlier views. Second, the majority rule would place control of precedent formation with the right actors—namely, the Justices of this Court, who are uniquely able to ascertain whether they do in fact agree on a rule of decision. The *Marks* rule, on the other hand, forces later courts to infer implied majority agreement or otherwise identify the "narrowest grounds." *Marks v. United States*, 430 U.S. 188, 193 (1977). Finally, the majority rule would encourage compromise, while the *Marks* rule creates an incentive for Justices to occupy the narrowest grounds by writing separately.

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[1] No counsel for a party authored this brief in whole or part, nor did any person or entity, other than the amicus and the UCLA School of Law, financially contribute to preparing or submitting this brief. All parties have consented to this filing.

Freeman and its aftermath perfectly illustrate why the *Marks* rule is misguided. If majority agreement actually existed in *Freeman v. United States*, 564 U.S. 522 (2011), then this Court should have said so at that time, thereby averting years of litigation, judicial disagreement, and sentencing patterns that eight Justices rejected. And if no majority agreement existed when this Court decided *Freeman*, then no new precedent should have formed—thereby leaving lower courts to percolate and explore the merits.

2. The Parties here propose different versions of the *Marks* rule, but neither is persuasive.

Petitioner follows some courts in arguing that a narrow version of the *Marks* rule can reveal implied majority agreement on a rule of decision. On that view, Justices who support broad grounds of decision are logically compelled to support the "narrowest" grounds offered by other Justices. But that view rests on a fallacy. It is often possible—even obligatory—to prefer no loaf to half a loaf. Likewise, jurists who have principled reasons to insist on a broad position often have good reason to reject admittedly "narrower" alternative grounds, including because those grounds may be unprincipled. In short, there is no substitute for actual, express agreement among most Justices. When that agreement is absent, no precedent of this Court should exist.

By contrast, the United States and several courts of appeals recognize that the *Marks* rule applies precisely when this Court issues a decision that lacks any majority agreement on a rationale. But there is no persuasive reason to treat views that lack majority support as binding, nationwide precedents. A focus

on results may be defensible under a predictive model of precedent, whereby lower courts attempt to anticipate how this Court would rule. But predictions often devolve into speculation, and even accurately predicted outcomes can easily generate unprincipled patterns—which is why this Court recognizes that precedent is generally concerned with reasons and rationales, not mere outcomes.

3. Stare decisis should not protect the *Marks* rule. This Court's original statement of the rule wasn't just "badly reasoned"—it wasn't justified at all. *Cf. Payne v. Tennessee*, 501 U.S. 808, 827 (1991). Moreover, the *Marks* rule has no persuasive foundation in pre-*Marks* judicial practice, and this Court has never attempted to explain the rule. Instead, this Court has twice indicated that the *Marks* rule is "easier stated than applied"—a strong signal that the rule has proven unworkable. *See Grutter v. Bollinger*, 539 U.S. 306, 325 (2003) (quoting *Nichols v. United States*, 511 U.S. 738, 745–46 (1994)). While courts have used the *Marks* rule increasingly often, most *Marks* applications focus on a small number of fragmented rulings. *See Beyond* Marks, at 10–16. In those cases, *Marks* has generally "defied consistent application by lower courts," yielding uncertainty that is not worth preserving. *Payne*, 501 U.S. at 829–30. On balance, the least disruptive option is to make a clean break with the *Marks* rule.

ARGUMENT

The *Marks* rule holds that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'" *Marks*, 430 U.S. at 193 (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976) (plurality opinion)). Though appellate courts have cited it with increasing frequency, the *Marks* rule systematically favors outlier views, discourages compromise, and fosters confusion. Moreover, no revision of the *Marks* rule can solve these problems; in some ways, clarifying the *Marks* rule would actually make matters worse. This Court should abandon the *Marks* rule in favor of a simple majority rule: precedents of this Court should form only when a single rule of decision "enjoys the assent" of a Court majority. *Id.*

I. A Precedent of This Court Should Form Only When a Majority of the Court Agrees on a Rule of Decision

The narrowest-grounds test is objectionable no matter how it is specified. The rule's basic defect is easily stated. Precedent should not form where most Justices oppose it. And if most Justices support it, they should say so. Requiring express majority agreement helpfully affords this Court control over precedent formation. There is no good reason to force later courts to speculate as to whether this Court previously reached majority agreement. Nor is there any reason to treat minority views as precedential. If anything, the fact that only a minority of the Court

supports a particular position is a reason for caution—not a reason to foist a binding precedent on the Nation. Moreover, clarifying the *Marks* rule would actually exacerbate some of its harmful effects by encouraging Justices to rely on it, including by strategically occupying the "narrowest grounds," rather than forging majority opinions. *See Beyond* Marks (elaborating the foregoing points).

Freeman and its aftermath offer a perfect example of how the *Marks* rule causes mischief. *Marks* led many courts to follow the concurrence in the judgement—yielding federal sentencing patterns that eight Justices expressly criticized as unjustifiable. *See Freeman*, 564 U.S. at 533 (plurality opinion) (objecting to the "erroneous" rule of the concurrence in the judgment); *id.* at 544 (Roberts, C.J., dissenting) (objecting to the concurrence in the judgment as "arbitrary and unworkable"). Things would have been better without the *Marks* rule. If most Justices had agreed on a rule of decision in *Freeman*, they could simply have said so. In the absence of that agreement, the lower courts would have been left free to continue exploring the underlying merits in light of the relevant legal materials, including the opinions in *Freeman* and related cases. The new thinking that comes from percolation is especially valuable when this Court has confronted a difficult, divisive issue. So the problem with *Freeman* was not so much that this Court did not generate a majority opinion; sometimes, agreement and compromise are inappropriate. Rather, the problem was that the *Marks* rule required litigants, lower courts, and now this Court to debate whether to imbue an outlier view with the binding force of stare decisis.

Or consider *Glossip v. Gross*, 135 S. Ct. 2726 (2015), where this Court most recently used the *Marks* rule. *Glossip* found a binding precedent in *Baze v. Rees*, 553 U.S. 35 (2008), a fragmented decision that included a three-Justice plurality and a two-Justice concurrence in the judgment. According to *Glossip*, the three-Justice plurality in *Baze* offered the "narrowest grounds" and so set a controlling precedent. *See* 135 S. Ct. at 2738 & n.2. Interestingly, five Justices who supported the Court's judgment in *Baze* also formed the *Glossip* majority. Perhaps those five Justices always agreed that the plurality opinion in *Baze* would and should create binding precedent under *Marks*. But because the Court did not actually express any such agreement, *Baze*'s precedential implications were left open to question. *See Baze v. Rees*, 553 U.S. 35, 94, 106 (2008) (Thomas, J., concurring in the judgment) (thoroughly rejecting the plurality's proposed standard, including for being "unprecedented and unworkable"). Confirming as much, the four-Justice dissent in *Glossip* argued that *Baze* created no precedent under *Marks*. *See* 135 S. Ct. at 2793 (Sotomayor, J., dissenting).

The point is not that this Court should maximize the amount of precedent or the number of its majority opinions. Disagreement among the members of this Court often counsels in favor of creating less precedent today and more flexibility tomorrow. Fragmented decisions are not in themselves lamentable, and a pivotal fifth Justice who refuses to form a majority opinion may well be acting appropriately. The point is instead that the majority of this Court should retain the ability to determine, on a case-by-case basis, whether there is sufficient agreement to

justify the creation of a precedent. Applying that approach, this Court routinely generates compromise opinions that express majority agreement on a single rule of decision. *See, e.g. Arizona v. Gant*, 556 U.S. 332, 344 (2009); *id.* at 351, 354 (Scalia, J., concurring); *see also Beyond* Marks 40–45 (discussing several examples). By contrast, the narrowest-grounds test transforms minority views into precedents that must be followed nationwide and are insulated from reconsideration by stare decisis.

II. The Parties' Proposed Versions of the *Marks* Rule Are Objectionable

Proponents of the *Marks* rule confront a dilemma: precedent should form only when there is majority agreement on a rule of decision, but the whole point of the *Marks* rule is to view opinions that lack majority support as precedential. In this case, the parties each grasp a different horn of this dilemma. Following the en banc D.C. Circuit and Ninth Circuit, the Petitioner recognizes that precedent should form only when most Justices support a "common rationale." By contrast, the United States follows the decision below in acknowledging that the *Marks* rule applies to rulings without a majority rationale. Each position has something right. And, as a result, both proposed approaches to *Marks* are wrong.

A. The Logical-Subset Test Rests on a Logical Fallacy

The Petitioner, the D.C. Circuit, and the Ninth Circuit have narrowly interpreted the *Marks* rule to apply only when one opinion represents a "logical subset" of another, broader opinion. Pet. Br. 38–44. The basic idea is that someone who supports a broad

position must necessarily—as a matter of logic—support a "narrower" position. *See United States v. Davis*, 825 F.3d 1014, 1016 (9th Cir. 2016) (en banc) (citing *United States v. Epps*, 707 F.3d 337, 350 (D.C. Cir. 2013)). On this view, "*Marks* is workable—one opinion can be meaningfully regarded as 'narrower' than another—only when one opinion is a logical subset of other, broader opinions." *Davis*, 825 F.3d at 1020 (quoting *King v. Palmer*, 950 F.2d 771, 781 (D.C. Cir. 1991) (en banc)). Expressed graphically, implicit majority approval for a single rationale exists whenever "one opinion supporting the judgment" can "fit entirely within a broader circle drawn by the others." *King*, 950 F.2d at 782.

Unfortunately, the "logical subset" test rests on a logical fallacy—namely, the fallacy of division. What is true of the whole is not necessarily true of its component parts. For example, salt is edible, but one of its components (chlorine) is toxic. Likewise, approval of a broad rule does not imply approval for any of its component rules or outcomes. *See Beyond* Marks 29. Imagine that four Justices categorically opposed prosecutions for political protests, while a single Justice opposed such prosecutions unless the protestors were communists. *Cf. Dennis v. United States*, 341 U.S. 494, 547 (1951) (Frankfurter, J., concurring in the judgment). Would the plurality necessarily support a First Amendment rule that protected everyone except communists? Of course not. The plurality might think that an exception for communists epitomized impermissible content-based discrimination. Reasons for breadth do not always tolerate narrowness, and exceptions can create their own problems.

Thus, supporters of broad views are not compelled to endorse—or even tolerate—"narrower" ones.

The fallacy underlying the logical-subset test is particularly visible in the D.C. Circuit's attempt to explain how the *Marks* rule applied in *Marks* itself, *see King*, 950 F.2d at 781 (citations omitted):

> In [*Memoirs v. Massachusetts*, 383 U.S. 413 (1966)], three separate views supported the judgment that the book was not obscene: the view expressed in the plurality opinion, which said that a book had to be "utterly without redeeming social value" to be considered obscene; the view of Justice Stewart that only "hardcore" pornography could be banned as obscene; and the view of Justices Black and Douglas, who believed that obscenity could never be banned. Because Justices Black and Douglas had to agree, as a logical consequence of their own position, with the plurality's view that anything with redeeming social value is not obscene, the plurality of three in effect spoke for five Justices.

Not so. Categorical opposition to obscenity prosecutions does not, "as a logical consequence," entail support for any narrower view, much less a rule allowing obscenity prosecutions for works that are "utterly without redeeming social value." In taking a categorical position, Justices Black and Douglas might have wanted to avoid precisely the kind of judgments that the plurality's "social value" inquiry called for. Or they might have thought that the First Amendment's language demanded a categorical answer, one way or the other. If Justices Black and Douglas had actually

wanted "the plurality of three" to speak "for five Justices" in *Memoirs*, they could have formed a majority opinion—as they did in other cases. *See, e.g.*, *Time, Inc., v. Hill*, 385 U.S. 374, 398 (1967) (Black, J., concurring) ("I do this, however, in order for the Court to be able at this time to agree on an opinion in this important case . . . ."); *id.* at 402 (Douglas, J., concurring) (similar).

On reflection, the ambition of the logical-subset test is incompatible with the *Marks* rule. The stated goal of looking for a logical subset is to find "implicit" majority rationales hidden within fragmented decisions. *See King*, 950 F.2d at 781 ("[T]he narrowest opinion must represent a common denominator of the Court's reasoning; it must embody a position implicitly approved by at least five Justices who support the judgment."). But, by its terms, the *Marks* rule applies "[w]hen . . . no single rationale explaining the result enjoys the assent of five Justices." *Marks*, 430 U.S. at 193. So the logical-subset test is actually at odds with *Marks* itself.

The en banc Ninth Circuit decision in *Davis v. United States* is a case in point. *Davis* opened its analysis by noting that "[f]ive justices ultimately agreed that Freeman was eligible for a reduction, but no rationale commanded a majority of the Court." 825 F.3d at 1019. That obvious point is what made the *Marks* rule applicable: *Freeman* was indeed a case in which "no single rationale explaining the result enjoys the assent of five Justices." *Marks*, 430 U.S. at 193. Yet the Ninth Circuit went on to conclude that a "fractured Supreme Court decision should only bind the federal courts of appeal when a majority of the Justices agree upon a single underly-

ing rationale." 825 F.3d at 1022. Paradoxically, the Ninth Circuit appeared to believe both that the *Marks* rule should apply where there is no majority rationale and that the rule applies only when there is a majority rationale. Alas, there is no "logical" way to have the *Marks* rule and a rule of majority agreement, too. This Court must choose.

B. The Convergent-Results Test Treats Outlier Views as Precedential

Some approaches to the *Marks* rule do not purport to identify majority agreement on a rule of decision. Instead, these approaches seek out convergent results—that is, discrete case outcomes that most Justices would agree with. The Eleventh Circuit decision below adopted a relatively stringent version of this approach: "*Marks* requires us to find a legal standard which, when applied, will necessarily produce *results* with which a majority of the Court from that case would agree." Pet. App. 12a (internal quotation marks and citations omitted); *see also id.* at 7a (purporting not to consider dissents when finding results convergence). This approach, which might be called the "convergent-results test," concedes that the *Marks* rule cannot uncover majority agreement on a rationale. *See id.* at 11a. The United States has adopted that approach. *See* BIO 10–11, 13.

The basic problem with the convergent-results test is that it systematically prefers outlier views among the Members of this Court. *Freeman* is illustrative. Again, eight Justices in *Freeman* disagreed with the rule put forward by Justice Sotomayor's concurrence in the judgment. Even if most Justices would necessarily reach the same result as the con-

currence in the judgment in any given case, that assumption would not provide a persuasive reason to view Justice Sotomayor's position as establishing a precedential rule. If anything, the various opinions in *Freeman* suggest that lower courts—and this Court—should approach Justice Sotomayor's solitary view with caution. Yet the convergent-results test would treat that outlier view as a binding, nationwide precedent. *See King*, 950 F.2d at 782 ("When eight of nine Justices do not subscribe to a given approach to a legal question, it surely cannot be proper to endow that approach with controlling force, no matter how persuasive it may be.").

To be clear, lower courts should give respectful consideration to the views expressed in single-Justice opinions. Solitary opinions play an important role in the law's development and have sometimes even been vindicated by later opinions of the Court. *See, e.g.*, *Grutter*, 539 U.S. at 325 (adopting the analysis set out by Justice Powell's solo opinion in *Regents of University of California v. Bakke*, 438 U.S. 265 (1972)); *see also Riley v. California*, 134 S. Ct. 2473, 2490 (2014) (citing *United States v. Jones*, 565 U.S. 400, 413 (2012) (Sotomayor, J., concurring)). But outlier views should become precedential only if and when they actually attain the Court's approval—and so are no longer outlier views at all.

The convergent-results test could be defended as a product of a predictive model of precedent, whereby lower courts attempt to anticipate how this Court would rule in discrete cases. However, this Court has generally discouraged lower courts from engaging in such predictions when construing precedent, *see Rodriguez de Quijas v. Shearson/American Express*,

Inc., 490 U.S. 477, 484 (1989), and for good reason. Predictions about how the Members of this Court will rule often turn out to rest on unwarranted speculation. And an emphasis on prediction tends to discourage new thinking about the merits—even though, in revisiting fragmented decisions, this Court can benefit from new insights that have percolated in the lower courts. *See E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 135 n.26 (1977) (noting "the wisdom of allowing difficult issues to mature through full consideration by the courts of appeals"). Finally, and most importantly, predictions that do not accord with majority views of the law may generate objectionable patterns—as *Freeman* again illustrates. *See also supra* pp. 8–9 (supplying other examples). The risk of generating objectionable rules may also explain why the decision below disavowed reliance on dissenting opinions, despite their evident predictive utility. *See* Pet. App. 7a.

As long as there is appellate review, lower courts will wonder how higher-court judges might vote in future rulings. But those predictions are not—and should not be—binding precedent.

III. Stare Decisis Should Not Protect the *Marks* Rule

The *Marks* rule plays a significant and growing role in legal practice, yet there is a powerful case for abandoning it. *See* Pet. Br. 55–59 (arguing in the alternative that the Court should revisit the rule). "[W]hen governing decisions are unworkable or are badly reasoned, this Court has never felt constrained to follow precedent." *Payne*, 501 U.S. at 827–28. And because the *Marks* rule "is judge made and impli-

cates an important matter involving internal Judicial Branch operations," the responsibility to take corrective action lies with this Court. *Pearson v. Callahan*, 555 U.S. 223, 233–34 (2009). Importantly, the stare decisis inquiry must consider the *Marks* rule as it has actually been stated and applied in the past—not as one might hope it will be applied in the future.

This Court's decision to adopt the narrowest-grounds test in *Marks* wasn't just "badly reasoned." *Payne*, 501 U.S. at 827. It wasn't reasoned at all. Before *Marks*, courts recognized a majority rule of precedent formation and did not generally apply the narrowest-grounds test. *See* AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY 356–61 (2012) (discussing the default majority rule); Comment, *Supreme Court No-Clear Majority Decisions: A Study in Stare Decisis*, 24 U. Chi. L. Rev. 99, 100 & n.10, 155 (1956) (collecting authorities on fragmented decisions). The only relevant authority that *Marks* cited was the plurality opinion in *Gregg v. Georgia*, which in turn cited no relevant authority. *See Marks*, 430 U.S. at 193 (quoting *Gregg*, 428 U.S. at 169 n.15 (plurality opinion)). Moreover, neither *Marks* nor the *Gregg* plurality provided any justification for adopting the narrowest-grounds test. That lack of reasoning is especially remarkable because *Marks* could have rested its outcome on a variety of narrower grounds. *See Grutter v. Bollinger*, 288 F.3d 732, 779 (6th Cir. 2002) (Boggs, J., dissenting) ("Taken on its face, *Marks* might be read only for the limited proposition that a criminal defendant cannot be held liable for conduct that he did not have fair notice would be prohibited."); *Beyond* Marks 5–8.

Experience has confirmed the *Marks* rule's theoretical shortcomings. In two separate decisions, this Court has already acknowledged not only that the *Marks* rule "baffled and divided the lower courts that have considered it," but also that the "test is more easily stated than applied." *Grutter*, 539 U.S. at 325 (quoting *Nichols*, 511 U.S. at 745–46). Lower courts have likewise lamented the indeterminacy of the narrowest-grounds test. *E.g.*, *Davis*, 825 F.3d at 1020 ("In the nearly forty years since *Marks*, lower courts have struggled to divine what the Supreme Court meant by 'the narrowest grounds.'"). The circuit split over *Freeman* is just the latest example of the rule's unworkability and tendency to foster confusion.

The strongest argument for retaining the *Marks* rule would focus on the possible disruptive effects of repudiating it. If the *Marks* rule were abandoned, cases that had applied the *Marks* rule would not have been overruled, but they might be cast into doubt. *Cf. Crawford v. Washington*, 541 U.S. 36, 60 (2004) (repudiating the "rationales" of this Court's earlier rulings but reassuringly noting that "the results of our decisions have generally been" correct). Further, this Court has issued many fragmented decisions that may have assumed the future operation of the *Marks* rule; and lower courts, including state courts, have used the rule with rapidly increasing frequency. *See Beyond* Marks at 8–16 (showing rising numbers of *Marks* rule citations in appellate courts). Looking to *Marks* citations may even underestimate the rule's influence, since courts sometimes rely on the rule without citing it. Unless this Court changes course, the *Marks* rule may soon become a framework ruling on judicial method. At first blush, reversing this

trend might seem like a tall order. Yet the disruptive effects of abandoning the *Marks* rule are not as great as appearances may suggest.

Marks rule citations are concentrated on a relatively small number of rulings, presumably because courts engage the rule only when a fragmented decision is the key precedent in an area and the choice between competing opinions is potentially outcome-determinative. *See Beyond* Marks 8–16. Yet the cases that are most often "*Marks*'d" have tended to generate intractable circuit splits. *See id.* Besides *Freeman*, examples include *United States v. Santos*, 553 U.S. 507 (2008), *Rapanos v. United States*, 547 U.S. 715 (2006), and *Missouri v. Seibert*, 542 U.S. 600 (2004). *See Garland v. Roy*, 615 F.3d 391, 402–03 (5th Cir. 2010) ("The other circuits that have analyzed *Santos* and Justice Stevens' concurring opinion, have adopted four different views of *Santos*'s holding."); *United States v. Lipar*, 665 Fed. App'x 322, 325 (5th Cir. 2016) ("[F]ollowing *Rapanos*, a split decision of the Supreme Court, there still exists a circuit split on the [relevant] statute's interpretation."); *United States v. Ray*, 803 F.3d 244, 270–72 (6th Cir. 2015) (discussing a three-sided circuit split on how the *Marks* rule applies to *Seibert*). Thus, the *Marks* rule has tended to generate the kind of uncertainty and confusion that is disentitled to stare decisis protection. *See Payne*, 501 U.S. at 827–28.

Other frequently *Marks*'d cases, such as *J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 873 (2011), and *Williams v. Illinois*, 567 U.S. 50 (2012), have yielded little guidance, either because the apparently "controlling" opinion seemingly does not change the law or because courts often—though not always—

agree that there is no discernible holding at all. *See, e.g.*, *AFTG-TG, LLC v. Nuvoton Tech. Corp.*, 689 F.3d 1358, 1363 (Fed. Cir. 2012) ("The narrowest holding is that which can be distilled from Justice Breyer's concurrence—that the law remains the same after *McIntyre*."); *State v. Norton*, 443 Md. 517, 542 (2015) ("[M]any other courts also have struggled to interpret *Williams* and apply its tenets.").

What is more, some apparent reliance on the *Marks* rule is illusory, in that the same precedential guidance would be available after *Marks*'s overruling. Whenever majority agreement across fragmented decisions is discernible, precedent would remain, even without *Marks*. *See, e.g.*, *McDonald v. City of Chicago*, 561 U.S. 742 (2010) (expressing majority agreement that the Second Amendment is incorporated, despite disagreement on why); *id.* at 805–06 (Thomas, J., concurring in part and concurring in the judgment). In addition, some oft-*Marks*'d cases have been superseded by majority decisions that have addressed the underlying merits. Examples include *Baldasar v. Illinois*, 446 U.S. 222 (1980), which was revisited in *Nichols*, as well as *Bakke*, which was revisited in *Grutter*.

Finally, adopting any specific version of the *Marks* rule is bound to be disruptive. Many courts apply *Marks* differently from either the Petitioner or the decision below. For example, some courts expressly consider dissenting opinions and find precedential guidance that spans multiple opinions. *See, e.g.*, *United States v. Bailey*, 571 F.3d 791, 799 (8th Cir. 2009) (following the *Rapanos* "dissent's instruction to find jurisdiction if either the plurality's test or Justice Kennedy's test is met"); *see also Beyond*

Marks 24–36 (criticizing several other versions of the *Marks* rule). Because lower courts have adopted myriad approaches to fragmented decisions, significant disruption is inevitable if the narrowest-grounds test is to be clarified. Under those circumstances, this Court should pursue the best rule available, unimpeded by stare decisis.

The *Marks* rule has fostered confusion and offered little unique guidance. Abandoning the rule would not be costless. But it is justified.

CONCLUSION

Instead of viewing *Freeman* as precedential, this Court should abandon the *Marks* rule in favor of a simple majority rule.

Respectfully submitted,

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No. 17-155

In The
Supreme Court of the United States

ERIK LINDSEY HUGHES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF AMICUS CURIAE OF CHANTELL AND MICHAEL SACKETT AND DUARTE NURSERY, INC., IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

This Court explained in *Marks v. United States*, 430 U.S. 188, 193 (1977), that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'" In *Freeman v. United States*, 564 U.S. 522 (2011), the Court issued a fractured 4-1-4 decision concluding that a defendant who enters into a plea agreement under Fed. R. Crim. P. 11(c)(1)(C) may be eligible for a reduction in his sentence if the Sentencing Commission subsequently issues a retroactive amendment to the Sentencing Guidelines. But the four-Justice plurality and Justice Sotomayor's concurrence shared no common rationale and the courts of appeals have divided over how to apply *Freeman*'s result. The questions presented are:

1. Whether this Court's decision in *Marks* means that the concurring opinion in a 4-1-4 decision represents the holding of the Court where neither the plurality's reasoning nor the concurrence's reasoning is a logical subset of the other.

2. Whether, under *Marks*, the lower courts are bound by the four-Justice plurality opinion in *Freeman*, or, instead, by Justice Sotomayor's separate concurring opinion with which all eight other Justices disagreed.

3. Whether, as the four-Justice plurality in *Freeman* concluded, a defendant who enters into a Fed. R. Crim. P. 11(c)(1)(C) plea agreement is generally eligible for a sentence

reduction if there is a later, retroactive amendment to the relevant Sentencing Guidelines range.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

INTEREST OF AMICUS CURIAE 1

INTRODUCTION AND SUMMARY OF ARGUMENT 2

ARGUMENT 6

I. THE CIRCUIT COURTS HAVE MISSED THE MARK WITH *MARKS* 6

II. *RAPANOS* ILLUSTRATES HOW WIDE OF *MARKS* THE CIRCUIT COURTS ARE 13

III. JUDICIAL POLICY ON PLURALITIES: WORKING TOWARD MAJORITIES 32

IV. THIS COURT'S CLARIFICATION OF *MARKS* WOULD GET THE CIRCUIT COURTS BACK ON TARGET 37

CONCLUSION 40

TABLE OF AUTHORITIES

Page

Cases

A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney Gen. of Mass., 383 U.S. 413 (1966) 7, 10, 22

AFTG-TG, LLC v. Nuvoton Tech. Corp., 689 F.3d 1358 (Fed. Cir. 2012) 34

Ainsworth v. Moffett Eng'g, Ltd., 716 F.3d 174 (5th Cir. 2013) 34

Baldasar v. Illinois, 446 U.S. 222 (1980) 35

Baze v. Rees, 553 U.S. 35 (2008) 33

City of Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750 (1988) 12

City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) 33

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Freeman v. United States, 564 U.S. 522 (2011) 3, 34

Furman v. Georgia, 408 U.S. 238 (1972) 6, 22

Garland v. Roy, 615 F.3d 391 (5th Cir. 2010) 5

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963 F. Supp. 2d 868 (D. Minn. 2013) 36

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(D. Minn. 2009) 34

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779 F. Supp. 2d 642 (E.D. Mich. 2011) 34

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564 U.S. 873 (2011) 34

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263 F.3d 1234 (11th Cir. 2001) 21

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792 F.3d 1331 (11th Cir. 2015) 4, 8

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561 U.S. 742 (2010) 33

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(9th Cir. 2010) 17

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132 S. Ct. 2566 (2012) 33

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511 U.S. 738 (1994) 7, 35

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Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.,
559 U.S. 393 (2010) 34

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(9th Cir. 2000) 4

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United States v. Robertson, 875 F.3d 1281 (9th Cir. 2017) 7, 31

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INTEREST OF AMICI CURIAE

Pursuant to Supreme Court Rule 37.3, Chantell and Michael Sackett and Duarte Nursery, Inc., submit this brief amicus curiae in support of Petitioner Erik Hughes.[1] Amici's interest in this case is in the first question presented, which may affect how fractured decisions other than *Freeman*, such as *Rapanos v. United States*, 547 U.S. 715 (2006), are applied by the lower courts.

Amici Chantell and Michael Sackett are the plaintiffs in *Sackett v. EPA*, presently pending, on remand from this Court, in the U.S. District Court for the District of Idaho, Case No. 2:08-cv-00185-N-EJL. The Sacketts are challenging an administrative compliance order issued by the Environmental Protection Agency, which directs them to restore a homesite they own near Priest Lake, Idaho, on the ground that their property contains navigable waters for which no dredge and fill permit will be issued under the Clean Water Act. *See generally, Sackett v. EPA*, 566 U.S. 120, 122 (2012). The sole issue in the Sacketts' challenge to the compliance order is whether their property contains federally protected navigable waters. A key basis on which the EPA defends its jurisdictional determination is that a putative wetland on the property meets the definition found in Justice Kennedy's concurring opinion in *Rapanos*. If Justice Kennedy's lone opinion is not the holding of

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[1] All parties have consented to the filing of this brief. No counsel for any party authored this brief in whole or in part and no person or entity made a monetary contribution specifically for the preparation or submission of this brief. No person other than Amici Curiae, their members, or their counsel made a monetary contribution to its preparation or submission.

Rapanos under a proper application of *Marks*, then a significant legal ground for the EPA's enforcement order against the Sacketts would be removed.

Amicus Duarte Nursery, Inc., is a farming company in California, with an ongoing interest in the scope of the federal government's exercise of regulatory authority over farming practices under the Clean Water Act. Duarte Nursery is a petitioner in *Washington Cattlemen's Association v. EPA*, pending in the Sixth Circuit, Case No. 15-4188, which challenges EPA's 2015 regulation defining "waters of the United States" under the Clean Water Act, on the ground that, *inter alia*, the regulation exceeds the statute as interpreted by this Court in *Rapanos*. *See generally In re: EPA*, 803 F.3d 804 (6th Cir. 2015). Duarte Nursery, Inc., is also a respondent before this Court in *National Association of Manufacturers v. Department of Defense*, Case No. 16-299.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents the Court with an opportunity to clarify the "narrowest grounds" test used to interpret fragmented decisions of this Court, as set out by *Marks v. United States*, 430 U.S. 188, 193 (1977).

In 2013, the United States charged Hughes federal drug and firearm offenses. Hughes thereafter entered, pursuant to Federal Rule of Criminal Procedure 11(c)(1)(C), into a plea agreement, which the district court accepted. Subsequently, the federal sentencing guidelines commission lowered the recommended sentence for Hughes's charged crimes.

Hughes thereupon asked for a sentence reduction, relying on a provision of the federal criminal code, 18 U.S.C. § 3582(c)(2), that allows a retroactive reduction in a sentence if it was "based on" the sentencing guidelines that were later changed. The central question in Hughes's case is whether a sentence based on a plea agreement also can be considered "based on" the sentencing guidelines such that Hughes may be entitled to retroactive relief.

This Court attempted to answer that question in *Freeman v. United States*, 564 U.S. 522 (2011), a plurality decision in which the Court held that the petitioner was entitled to a sentence reduction, but no opinion of the Court commanded a majority of the justices. A four-Justice plurality argued that a Rule 11(c)(1)(C) agreement generally is subject to retroactive sentencing relief, if the judge's decision to accept the agreement was based on the sentencing guidelines. Justice Sotomayor concurred in the judgment only. In her view, the availability of retroactive relief depends not on what the judge thought or said, but rather on what the Rule 11(c)(1)(C) agreement expressly contemplates. The lower courts, however, are irreconcilably split on how to interpret *Freeman*, because they disagree on how to interpret split decisions.

The difficulty that lower courts have experienced interpreting *Freeman* is reflective of widespread confusion among the lower courts regarding the *Marks* test. Much of that confusion stems from the fact that, in the four decades since *Marks*, this Court has not clarified the criteria for determining the "narrowest grounds," or whether such an opinion

exists.[2] Thus, many lower courts interpret *Marks* as directing them to search for a single "narrowest" opinion—even where the putatively "narrowest" opinion reflects the reasoning of only one of the Court's nine members.[3] Other courts find it inappropriate to give binding effect to portions of an opinion in which a majority of Justices did not explicitly or implicitly acquiesce.[4] Still other courts consider the rationale of dissenting opinions when striving to find the "narrowest grounds."[5] Given this,

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[2] *See, e.g.*, *United States v. Martino*, 664 F.2d 860, 872 (2d Cir. 1981) (observing that the Supreme Court has not "elaborated on what was meant by 'narrowest grounds'"); *cf. Lisk v. Lumber One Wood Preserving, LLC*, 792 F.3d 1331, 1337 (11th Cir. 2015) ("For some issues, asking which of two opinions is narrower is akin to asking, 'Which is taller, left or right?'").

[3] *See, e.g.*, *United States v. Dixon*, 687 F.3d 356, 359 (7th Cir. 2012) (holding that "[e]ven though eight Justices disagreed with Justice Sotomayor's approach [in *Freeman v. United States*, 564 U.S. 522 (2011),] and believed it would produce arbitrary and unworkable results, her reasoning" was nonetheless controlling under *Marks* (citation omitted)); *Smith v. Univ. of Wash. Law Sch.*, 233 F.3d 1188, 1198, 1200 (9th Cir. 2000) (concluding that Justice Powell's opinion controlled in *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978), even though "none of the other Justices fully agreed with Justice Powell's opinion").

[4] *See, e.g.*, *United States v. Epps*, 707 F.3d 337, 348 (D.C. Cir. 2013) (concluding that the "narrowest opinion" under *Marks* "must represent a common denominator of the Court's reasoning" and "must embody a position implicitly approved by at least five Justices who support the judgment" (emphasis omitted) (quoting *King v. Palmer*, 950 F.2d 771, 781 (D.C. Cir. 1991) (en banc)).

[5] *Compare, e.g.*, *United States v. Donovan*, 661 F.3d 174, 182–83 (3d Cir. 2011) (interpreting *Marks* and subsequent Supreme Court opinions to require that lower courts "examine the dissenting Justices' views to see if there is common ground" among a majority as to a rationale), *with, e.g.*, *King*, 950 F.2d at

it is unsurprising to find a series of long-standing circuit splits on important legal issues resulting from disagreements regarding the "narrowest grounds" rule.[6]

Amici curiae urge this Court to clarify the *Marks* rule. In particular, Amici urge this Court to emphasize that lower courts may not use dissenting opinions in determining the narrowest grounds for judgment; lower courts may not use multiple opinions supporting the judgment if neither satisfies the *Marks* "narrowest grounds" test; lower courts should be particularly cautious about determining single Justice opinions to be the holding of a fractured decision; and lower courts should determine the "narrowest grounds" for a decision without regard to which opinion most narrowly constrains government power and with careful attention to the issue actually decided by the judgment in the case.

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783 ("[W]e do not think we are free to combine a dissent with a concurrence to form a *Marks* majority.").

[6] *See, e.g.*, *Garland v. Roy*, 615 F.3d 391, 402–03 (5th Cir. 2010) (identifying a four-way circuit split regarding application of *Marks* to *United States v. Santos*, 553 U.S. 507 (2008), and rejecting all four in favor of a fifth distinct approach); Berkolow, *Much Ado About Pluralities: Pride and Precedent Amidst the Cacophony of Concurrences, and Re-Percolation After* Rapanos, 15 Va. J. Soc. Pol'y & L. 299, 334–44 (2008) (describing a circuit split regarding the proper application of *Marks* to the opinions in *Rapanos v. United States*, 547 U.S. 715 (2006)); B. Andrew Bednark, Note, *Preferential Treatment: The Varying Constitutionality of Private Scholarship Preferences at Public Universities*, 85 Minn. L. Rev. 1391, 1398-99 (2001) (identifying a three-court split as to the controlling opinion in *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978)).

ARGUMENT

I

THE CIRCUIT COURTS HAVE MISSED THE MARK WITH *MARKS*

This Court articulated the rule for determining the controlling rule of law when no single opinion commands a majority of the members of the Court in *Marks v. United States*, 430 U.S. 188 (1977). There, the Court instructed that the controlling opinion is that which supports the judgment on the "narrowest grounds."[7] *Id.* at 193. As simple as that rule sounds, history has shown it to be difficult to apply, resulting in numerous splits of authority among the lower courts when interpreting fragmented decisions.[8]

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[7] This rule for interpreting fractured opinions derived from the Supreme Court's decision in *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976). In *Gregg*, the Court examined *Furman v. Georgia*, 408 U.S. 238 (1972), which involved a challenge to the constitutionality of a Georgia death penalty statute. In *Furman*, five Justices had agreed in the judgments, but the Court split on the legal standard that should be applied to death penalty cases: two concurring Justices felt that capital punishment was unconstitutional in all cases, whereas the other three Justices believed that capital punishment was unconstitutional only in the circumstances presented by the case. Concluding that the plurality opinion controls, *Gregg* explained that "Since five Justices wrote separately in support of the judgments in *Furman*, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . ." *Gregg*, 428 U.S. at 169 n.15.

[8] Despite this difficultly, the "narrowest ground" test is the only rule sanctioned by this Court for interpreting its split decisions. *See Gregg v. Georgia*, 428 U.S. at 169 n.15; *Furman v. Georgia*, 408 U.S. 238 (1972); *see also In re Cook*, 322 B.R. 336, 341 (Bkrtcy. N.D. Ohio 2005) ("The only approach approved by the Supreme Court is the 'narrowest grounds' approach.").

United States v. Robertson, 875 F.3d 1281, 1290 (9th Cir. 2017) ("[r]ecognizing the difficulty that courts have faced in discerning what the Supreme Court meant by 'narrowest grounds'"); *United States v. Davis*, 825 F.3d 1014, 1020 (9th Cir. 2016)("In the nearly forty years since *Marks*, lower courts have struggled to divine what the Supreme Court meant by 'the narrowest grounds.'"); *see also Nichols v. United States*, 511 U.S. 738, 746 (1994) (*Marks* has "baffled and divided the lower courts that have considered it."); *see also* Note, *Plurality Decisions and Judicial Decisionmaking*, 94 Harv. L. Rev. 1127, 1130 (1981) (stating that some plurality decisions are "incomprehensible" to lower courts).

Much of that confusion, however, arises from the lower courts' failure to faithfully follow *Marks*. In *Marks*, this Court was asked to determine the standard applicable to regulations restricting obscene material. 430 U.S. at 188–90. To answer that question, the Court turned to its fractured decision in *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney Gen. of Mass.*, 383 U.S. 413, 419, 421 (1966). There, three Justices in the plurality decided a book was protected from government regulation if it was otherwise "obscene" but had some social redeeming value. *Id.* at 419, 443. Two other Justices concurred in the judgment, relying on what the Court called "broader grounds" that the First Amendment provided an absolute shield against government action to suppress obscenity. *Id.* at 421, 424. A sixth Justice concurred in the judgment based on his view that only hardcore pornography may be suppressed. *Id.* at 421. *Marks* concluded that the three-Justice plurality was the "narrowest grounds"

for the judgment and the controlling opinion in the case.[9] 430 U.S. at 193-94.

Despite the seeming simplicity of this rule, the precise manner in which a court is to determine which opinion rests on the "narrowest grounds," however, is subject to widespread confusion.[10] *Marks* states that for an opinion to constitute the "narrowest grounds," it must be a logical subset of the other opinions

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[9] Importantly, *Marks* rejected the common argument that plurality decisions, by their very nature, have no precedential effect. *See, e.g., Wiesenfeld v. Sec'y of Health, Educ. & Welfare*, 367 F. Supp. 981, 988 (D.N.J. 1973); Mark Alan Thurmon, Note, *When the Court Divides: Reconsidering the Precedential Value of Supreme Court Plurality Decisions*, 42 Duke L.J. 419, 420 (1992). Some state courts still adhere to this view regarding the precedential significance of their own plurality decisions. *See, e.g., Rowland v. Washtenaw Cty. Rd. Comm'n*, 731 N.W.2d 41, 47 n.7 (Mich. 2007) ("[D]ecisions in which no majority of the justices participating agree with regard to the reasoning are not an authoritative interpretation under the doctrine of stare decisis.").

[10] *Compare, e.g., Green v. Haskell Cty. Bd. of Comm'rs*, 568 F.3d 784, 807 n.17 (10th Cir. 2009) ("Given that [*Van Orden v. Perry*, 545 U.S. 677 (2005),] was decided by a plurality, the separate opinion of Justice Breyer, who supplied the 'decisive fifth vote,' is controlling under the rule of *Marks*." (citations omitted) (quoting *Heideman v. S. Salt Lake City*, 348 F.3d 1182, 1198 (10th Cir. 2003))), *with, e.g., United States v. Carrizales-Toledo*, 454 F.3d 1142, 1151 (10th Cir. 2006) ("In practice, . . . the *Marks* rule produces a determinate holding 'only when one opinion is a logical subset of other, broader opinions.'" (quoting *King v. Palmer*, 950 F.2d 771, 781 (D.C. Cir. 1991) (en banc))). Some circuit courts have even commented on this internal inconsistency. *See, e.g., Lisk v. Lumber One Wood Preserving, LLC*, 792 F.3d 1331, 1337 (11th Cir. 2015) ("[W]e apparently have taken as many as three different approaches [to the narrowest grounds rule]—or we at least have articulated our approach three different ways—when confronting other fragmented Supreme Court decisions.").

supporting the judgment: "In essence, the narrowest opinion must represent a common denominator of the Court's reasoning; it must embody a position implicitly approved by at least five Justices who support the judgment." *King v. Palmer*, 950 F.2d 771, 781 (D.C. Cir. 1991) (en banc) (holding *Marks* works only when "one opinion is a logical subset of . . . broader opinions"); *see also, e.g., United States v. Alcan Aluminum Corp.*, 315 F.3d 179, 189 (2d Cir. 2003); Lewis A. Kornhauser & Lawrence G. Sager, *The One and the Many: Adjudication in Collegial Courts*, 81 Cal. L. Rev. 1, 45–48 (1993) (arguing *Marks* doctrine only works when concurring rationales "fit [] within each other like Russian dolls"). Put another way:

> The Justices supporting the broader legal rule must necessarily recognize the validity of the narrower legal rule. That is, if a statute is found to be constitutionally permissible pursuant to a strict scrutiny standard of review, then it is necessarily permissible pursuant to a rational basis standard of review. From the text of the alternative concurring opinions, it is possible to determine that if all of the Justices apply the narrower rule, the outcome would have been the same.

Ken Kimura, *A Legitimacy Model for the Interpretation of Plurality Decisions*, 77 Cornell L. Rev. 1593, 1603–04 (1992) (footnote omitted). So viewed, the *Marks* rule supports the principle of majoritarianism by ascertaining, where possible, the narrow legal proposition that is supported by a majority and that is consistent with the disposition of

the case. *See King*, 950 F.2d at 781 ("[T]he narrowest opinion must . . . embody a position implicitly approved by at least five Justices who support the judgment.").

This interpretation of *Marks* is consistent with the cases cited therein. Consider, for example, the three judgment-supportive opinions in *Memoirs*. The broadest rationale supporting the judgment in that case was the opinion of Justices Black and Douglas, which would categorically ban obscenity prosecutions. Justice Stewart's sole concurrence provided a narrower rule, concluding that only "hardcore pornography" should be subject to prosecution. Finally, Justice Brennan's plurality opinion provided the narrowest subset by proposing a three-part test to determine the circumstances when obscenity can be subject to prosecution. Each of those opinions aligns in a manner that reflects consensus among the six concurring Justices regarding the proper application of their respective rationales. Thus, any obscenity prosecution deemed impermissible under Justice Brennan's plurality opinion would necessarily be considered impermissible under the more speech-protective rationales endorsed by Justices Stewart, Black, and Douglas. Without such alignment between the judgment-supportive opinions, courts risk elevating the viewpoint of a minority of the Court into a rule of law.

Marks addressed this risk by recognizing that there will be times when the "narrowest grounds" test does not work—*i.e.*, when no opinion is a logical subset of any other. In that circumstance, there is no rule of law to be found in the decision, and only the judgment controls.

> When, however, one opinion supporting the judgment does not fit entirely within a broader circle drawn by the others, *Marks* is problematic. If applied in situations where the various opinions supporting the judgment are mutually exclusive, *Marks* will turn a single opinion that lacks majority support into national law. When eight of nine Justices do not subscribe to a given approach to a legal question, it surely cannot be proper to endow that approach with controlling force, no matter how persuasive it may be.

King, 950 F.2d at 782.

A rule that forced lower courts to glean a precedential rule of law in such a circumstance would undermine the judicial process by transferring the power to establish precedent away from the majority and toward individual Justices, presumably on the theory that his or her concurring opinion reflects the position that a majority of the Court would most likely have reached on had they been "forced to choose" a single rationale. *See, e.g., United States v. Gerke Excavating, Inc.*, 464 F.3d 723, 724 (7th Cir. 2006) (interpreting *Marks* to require "lower-court judges . . . to follow the narrowest ground to which a majority of the Justices would have assented if forced to choose"). Plurality decisions, however, are only made possible because the Justices are not forced to choose in this way and have instead chosen not to adopt a single opinion as the authoritative position of the Court.[11]

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[11] *See, e.g., Rapanos v. United States*, 547 U.S. at 810 (Stevens, J., dissenting) ("It has been our practice in a case coming to us from a lower federal court to enter a judgment commanding that court to conduct any further proceedings pursuant to a specific

Thus, while a majority may opt to join in a single rationale, that fact alone does not justify the suggestion that lower courts must act as if the majority actually did so.

Importantly, both *Marks* and *Gregg* instructed lower courts to identify the "holding of the Court" by looking to the "position taken by those [Justices] who concurred in the judgments on the narrowest grounds." *Marks*, 430 U.S. at 193 (quoting *Gregg v. Georgia*, 428 U.S. at 169 n.15). The opinion of dissenting Justices cannot constitute part of the logical set supporting the judgment and cannot be combined with a concurring opinion in order to formulate a precedential rule of law. *See City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 764 n.9 (1988) (criticizing the dissenting opinion's reliance on a dissenting opinion as inconsistent with *Marks*); *see also* Jonathan H. Adler, *Reckoning with* Rapanos*: Revisiting "Waters of the United States" and the Limits of Federal Wetland Regulation*, 14 Mo. Envtl. L. & Pol'y Rev. 1, 14 (2006) ("Nothing in the dissent constitutes a portion of the judgment of the Court, so nothing in the dissent" can be "part of the actual holding of the case" under *Marks*.); A.M. Honore, Note, *Ratio Decidendi: Judge and Court*, 71 Law Q. Rev. 196, 198 (1955) ("[O]pinions of [dissenting] judges cannot form part of the *ratio decidendi* of a case [because] they are not reasons for the order made by the court . . . .").

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mandate. That prior practice has, on occasion, made it necessary for Justices to join a judgment that did not conform to their own views.").

The below discussion of the lower courts' inconsistent application of *Marks* to the plurality decision in *Rapanos* illustrates this deeply entrenched confusion over the "narrowest grounds" and what portions of a fractured decision may be considered. Only clarification by this Court will bring an end to the widening disagreement among the lower courts.

II

RAPANOS ILLUSTRATES HOW WIDE OF *MARKS* THE CIRCUIT COURTS ARE

In *Rapanos*, the Supreme Court sought to define the scope of the Clean Water Act (CWA),[12] which prohibits the discharge of pollutants, including dredged and fill material, into "navigable waters" without a federal permit[13] and defines the term "navigable waters" as "waters of the United States."[14] *Id.* at 730–32. The Army Corps of Engineers claimed the CWA covered the shallow wetlands on John Rapanos's Michigan lots. *Id.* at 729-30. When he graded the lots for construction, Corps officials cited Mr. Rapanos for filling "navigable waters" without a permit in violation of the Act. *Id.* The district court found Mr. Rapanos liable because the wetlands on his property bordered a manmade drainage ditch that flowed intermittently through a series of conduits to a navigable-in-fact watercourse miles away.[15] The Sixth Circuit Court of Appeals upheld the district court on the theory that any hydrological connection with a

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[12] Clean Water Act, 33 U.S.C. §§ 1251–1275 (2012).
[13] 33 U.S.C. § 1344(a) (2012).
[14] 33 U.S.C. § 1362(7) (2012).
[15] *See United States v. Rapanos*, 190 F. Supp. 2d 1011, 1013 (E.D. Mich. 2002).

traditional navigable water was sufficient for federal jurisdiction, no matter how slight.[16] In a fractured decision, this Court reversed the Sixth Circuit, however, invalidating the Army Corps regulation's expansive interpretation of the CWA. *Id.* at 757; *see National Association of Manufacturers v. Department of Defense*, No. 16-299 (Jan. 22, 2018), slip op. at 4 (Court struck down overbroad regulations in *Rapanos*).

Five of the nine Justices agreed the Corps' regulations exceeded the scope of the Act and that the agency could not regulate all waters based solely on a hydrological connection to a downstream navigable-in-fact waterway. Chief Justice Roberts observed:

> Rather than refining its view of its authority in light of our decision in *SWANCC*,[17] and providing guidance meriting deference under our generous standards, the Corps chose to adhere to its essentially boundless view of the scope of its power. The upshot today is another defeat for the agency.

Rapanos, 547 U.S. at 758.

Writing for a four-member plurality, Justice Scalia agreed:

> In applying the definition to "ephemeral streams," "wet meadows," storm sewers and culverts, "directional sheet flow during storm events," drain tiles, man-made drainage ditches, and dry arroyos in the middle of the

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[16] *See United States v. Rapanos*, 376 F.3d 629, 642 (6th Cir. 2004). *See id.* at 639.

[17] *See Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 168 (2001) ("*SWANCC*").

> desert, the Corps has stretched the term "waters of the United States" beyond parody. The plain language of the statute simply does not authorize this "Land Is Waters" approach to federal jurisdiction.

Id. at 734.

Justices Scalia, Thomas, Alito, and Roberts determined the language, structure, and purpose of the CWA limited federal authority to "relatively permanent, standing or continuously flowing bodies of water" commonly recognized as "streams, oceans, rivers and lakes" connected to traditional navigable waters. *Id.* at 716, 739. The Scalia plurality would also authorize federal regulation of wetlands physically abutting these water bodies, but only if they have a continuous surface water connection whereby the wetland and water body are literally "indistinguishable." *Id.* at 755.

Although Justice Kennedy joined the plurality in finding the agency regulations beyond the scope of the Act, providing a five-member majority in favor of Mr. Rapanos, he proposed a different standard for determining "waters of the United States" subject to federal control under the Act. Under a "significant nexus"[18] test, the federal government could regulate a wetland if it significantly affects a navigable-in-fact waterway. *Id.* at 780. This excludes from federal regulation remote drains, ditches, and streams with insubstantial flows and only speculative evidence of a "significant nexus." *Id.* at 779-81.

The four Justices in the dissent (Stevens, Souter, Ginsburg, and Breyer) would have granted *Chevron*

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[18] *Id.* at 759 (Kennedy, J., concurring).

deference to uphold the Corps' regulations, and took the view that the Act allowed the Corps to regulate any feature that advanced the statutory goal of maintaining the "chemical, physical, and biological integrity of the Nation's waters." *Id.* at 787. (Stevens, J., dissenting).

Although *Rapanos* provided a clear majority that the Corps' regulatory definition of "waters of the United States" are invalid, the five prevailing Justices split four to one on their rationale. *Id.* at 718. Consequently, the lower courts must decide the controlling opinion, if there is one, to determine whether *Rapanos* stands for more than the invalidity of the Corps' regulations. In putative reliance on *Marks*, many circuit courts have either adopted the lone Kennedy concurrence, or rejected *Marks* as unworkable. Other courts have adopted an either/or test allowing the government to establish federal jurisdiction under either the Kennedy concurrence or the Scalia plurality. Still others have adopted the Kennedy concurrence as a subset of the dissenting opinion's rationale.

The following cases demonstrate the depth of conflict in the lower court's application of *Marks*.

Northern California River Watch v. City of Healdsburg

The Ninth Circuit was the first Circuit Court to apply *Marks* to *Rapanos*. In *Northern California River Watch v. Healdsburg (River Watch I)*, the court summarily concluded the Kennedy concurrence was controlling without further discussion:

> Justice Kennedy, constituting the fifth vote for reversal, concurred only in the judgment

> and, therefore, provides the controlling rule of law. *See Marks v. United States*, 430 U.S. 188 (1977) (citation omitted), (explaining that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds").

457 F.3d 1023, 1029 (9th Cir. 2006). This summary disposition adds nothing to an understanding of the *Marks* analysis. It is unclear why the Ninth Circuit concluded the Kennedy concurrence is controlling, and this conclusion has been drawn into question by the more recent Ninth Circuit decision in *United States v. Davis*, discussed later.

The Ninth Circuit decision on panel rehearing in *Northern California River Watch v. City of Healdsburg*, 496 F.3d 993, 1000 (9th Cir. 2007) (*River Watch II*), affirms its decision in *River Watch I* that the Kennedy test is controlling, because it is the least restrictive of federal authority.[19] *River Watch II* was issued on panel rehearing from *River Watch I*, following the issuance of the Seventh Circuit's decision in *United States v. Gerke*, discussed next.

United States v. Gerke

United States v. Gerke Excavating, Inc. was the next appellate case to apply *Marks* to the *Rapanos* decision. 464 F.3d 723, 724 (7th Cir. 2006). Gerke was charged with filling "waters of the United States"

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[19] *But see N. Cal. River Watch v. Wilcox*, 633 F.3d 766, 781 (9th Cir. 2010) (*Healdsburg* did not foreclose establishing jurisdiction under the plurality decision as well as the Kennedy concurrence).

without a federal permit under the CWA. *Id.* at 723. Gerke challenged the government's jurisdiction in the case and petitioned the Supreme Court after losing in the Seventh Circuit. *Id.* at 723–24. This Court granted certiorari and remanded the case in light of *Rapanos*. *Id.* at 724. On remand, the Seventh Circuit held in a per curiam decision that Justice Kennedy's concurring opinion was controlling because: (1) that opinion was the least restrictive of government authority; and (2) when joined with the four dissenters, Justice Kennedy's opinion made up a majority on the Court. *Id.* at 724–25.

To reach that conclusion, however, the Seventh Circuit misstated the *Marks* test. According to *Gerke*:

> When a majority of the Supreme Court agrees only on the outcome of a case and not on the ground for that outcome, lower court-judges are to follow the narrowest grounds to which a majority of the Justices would have assented if forced to choose.

Id. at 724; *but see Marks*, 430 U.S. at 193 (The holding of a plurality opinion "may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds."). This misstatement of *Marks* allowed the Seventh Circuit to aggregate the Kennedy concurrence with the four dissenting Justices to reach a majority. But *Marks* does not allow consideration of the dissenting opinions in a fractured decision like *Rapanos*.

Later, in *Gibson v. American Cyanamid. Co.*, the Seventh Circuit revisited its *Gerke* decision, holding it had been wrong to count the *Rapanos* dissent in ruling on the controlling opinion. 760 F.3d 600, 621 (7th Cir.

2014) ("Of course, *Marks* itself is binding on us, and instructs that only those positions of the Justices concurring in the outcome count in the analysis."). *Gibson* explained that it makes sense to exclude dissenting opinions because "by definition, the dissenters have disagreed with both the plurality and any concurring Justice" as to the outcome as well as how the governing standard should apply. *Id.* at 620. It is very likely, the court said, that if the dissenters disagree (and are cited) then the lower courts and litigants "will not have a clear idea on the contours of the standard and how to apply it in future cases." *Id.* "This is not the way to make binding precedent." *Id.*

Accordingly, in *Gibson* the Seventh Circuit concluded that its reliance on the *Rapanos* dissent in *Gerke* was dicta and not necessary to the decision. *Gibson*, 760 F.3d at 621. Nevertheless, *Gibson* affirmed *Gerke*'s conclusion that Justice Kennedy's concurrence in *Rapanos* was the "narrowest grounds" and therefore controlling. *Id.*

Gerke cited no authority for the proposition that "narrowest grounds" means least restrictive of government authority. Nor could that standard apply universally because not all split decisions involve the government. If *Gerke* had been true to *Marks* and discounted the dissent, it could have found a majority by looking to the *Rapanos* plurality as the "narrowest grounds."[20] Whenever the plurality would find a

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[20] In *Rapanos*, the plurality thought Justice Kennedy's "significant nexus" approach was not much narrower than the outsized reading the Corps (and the dissent) gave the Act. "Justice Kennedy tips a wink at the agency, inviting it to try its same expansive reading again." 547 U.S. at 756 n.15. And, as noted above, the dissent opined that "Justice Kennedy's

jurisdictional water, Justice Kennedy would agree because the plurality test is a logical subset of Justice Kennedy's broader "significant nexus" test. Together, the four Justices in the plurality and Justice Kennedy constitute a five-member majority—without distorting *Marks*. *See* M. Reed Hopper, *Running Down the Controlling Opinion in* Rapanos v. United States (March 10, 2017). University of Denver Water Law Review, Forthcoming. Available at SSRN: https://ssrn.com/abstract=2983915.

United States v. Johnson

In *United States v. Johnson*, the government cited landowners under the CWA for converting wetlands to cranberry bogs without a federal permit. 467 F.3d 56, 58 (1st Cir. 2006). In defense, the landowners challenged the government's statutory jurisdiction. *Id.* A split panel of the First Circuit Court of Appeals upheld federal jurisdiction citing a "hydrological connection" to navigable waters. *Id.* Shortly thereafter, this Court invalidated that basis for jurisdiction in *Rapanos*. On remand, the First Circuit rejected *Gerke*'s interpretation of *Marks* and declared that the trial court could establish federal jurisdiction under either the Scalia plurality test or the Kennedy "significant nexus" test. *Id.* at 66. But this just exacerbated the confusion over how to apply *Marks* to *Rapanos*.

The First Circuit thought it curious that *Gerke* equated "narrowest grounds" with the opinion least restrictive of federal authority. "Such an equation,"

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approach . . . treats more of the Nation's waters as within the Corps' jurisdiction," and it would be a rare case when the plurality test is met and the Kennedy test is not. *Id.* at 754 n.14.

the court stated, "leaves unanswered the question of how one would determine which opinion is controlling in a case where the government is not a party." *Johnson*, 467 F.3d at 63. The court found it "just as plausible to conclude that the narrowest ground of decision in *Rapanos* is the ground most restrictive of government authority (the position of the plurality)," because, the court concluded, "that ground avoids the constitutional issue of how far Congress can go in asserting jurisdiction under the Commerce Clause." *Id.*

In contrast to the Seventh Circuit's reading of *Marks* in *Gerke*, the First Circuit suggested the "narrowest grounds" might sensibly be interpreted to mean the "less far-reaching-common ground,"[21] or the opinion "most clearly tailored to the specific fact situation before the Court and thus applicable to the fewest cases." *See* Mark Alan Thurmon, Note, *When the Court Divides: Reconsidering the Precedential Value of Supreme Court Plurality Decisions*, 42 Duke L.J. 419, 420–21 (1992). Relying on *King v. Palmer*,[22] the First Circuit noted the D.C. Circuit found "*Marks* is workable—one opinion can be meaningfully regarded as 'narrower' than another—only when one opinion is a logical subset of other, broader opinions." *Johnson*, 467 F.3d at 63. "In other words," the First Circuit explained, "the 'narrowest grounds' approach makes the most sense when two opinions reach the same result in a given case, but one opinion reaches that result for less sweeping reasons than the other."

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[21] *Johnson*, 467 F.3d at 63 (quoting *Johnson v. Bd. of Regents of Univ. of Ga.*, 263 F.3d 1234, 1247 (11th Cir. 2001)).
[22] 950 F.2d at 781.

Id. at 64. According to the First Circuit, *Marks* followed this approach.

For examples, the court cited *Furman*[23] and *Memoirs*[24] upon which *Marks* was based. In *Furman*, the First Circuit observed, "the Justices who concluded that capital punishment was per se unconstitutional would always strike down future death penalty sentences," but the Justices who found the death penalty unconstitutional only as administered in *Furman* "would only strike down capital sentences in a subset of future capital cases." *Johnson*, 467 F.3d at 64. Likewise, in *Memoirs*, "two Justices would always require a ruling in favor of protecting speech, but the view of three other Justices that only non-obscene speech is protected would extend First Amendment protection only to a subset of such cases." *Id.* The First Circuit therefore concluded the "less sweeping opinion in each case [i.e., the opinions that are the logical subset of the other per se opinions] represents the 'narrowest grounds' for the decision." *Id.*

Having concluded that *Marks* applies only where one opinion is the subset of another concurring opinion, the First Circuit then held the understanding of "narrowest grounds" does not translate easily to *Rapanos*: "The cases in which Justice Kennedy would limit federal jurisdiction are not a subset of the cases in which the plurality would limit jurisdiction." *Id.* For this reason, the court rejected *Gerke*'s conclusion that, under *Marks*, Justice Kennedy's lone concurrence is controlling in *Rapanos*. Instead, the First Circuit held the "federal government can

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[23] *See generally Furman*, 408 U.S. 238.

[24] *See generally Memoirs*, 383 U.S. 413.

establish jurisdiction over the target sites if it can meet either the plurality's or Justice Kennedy's standard as laid out in *Rapanos*." *Id.* at 66.

Notably, the First Circuit cited, with approval, that a number of Circuits have abandoned the *Marks* approach to split opinions or applied *Marks* selectively. *Johnson*, 467 F.3d at 64. Instead, those courts have sought to divine the controlling opinion in this Court's fragmented decisions, like *Rapanos*, by adopting a so-called "pragmatic" approach to the situation. *Id.* This approach involves assessing which grounds would "command a majority of the Court." *Id.* In *Tyler v. Bethlehem Steel Corp.*, for example, the Second Circuit concluded: "In essence, what we must do is find common ground shared by five or more justices." 958 F.2d 1176, 1182 (2d Cir. 1992). Similarly, in *United States v. Williams*, the Ninth Circuit held,

> [w]e need not find a legal opinion which a majority joined, but merely "a legal standard which, when applied, will necessarily produce results with which a majority of the Court from that case would agree."

435 F.3d 1148, 1157 (9th Cir. 2006) (quoting *Planned Parenthood of Se. Pa. v. Casey*, 947 F.2d 682, 693 (3d Cir. 1991)).

The First Circuit in *Johnson* used similar logic to justify its determination that federal jurisdiction over wetlands could be established under either the plurality test in *Rapanos* or the Kennedy test: "If Justice Kennedy's test is satisfied, then at least Justice Kennedy plus the four dissenters would support jurisdiction. If the plurality's test is satisfied,

then at least the four plurality members plus the four dissenters would support jurisdiction." *Johnson*, 467 F.3d at 64.

The First Circuit also relied on *Student Public Interest Research Group of New Jersey, Inc. v. AT&T Bell Labs*,[25] wherein the Third Circuit examined *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*[26] to determine the controlling opinion. In *Pennsylvania*, the Supreme Court was asked to address the availability of contingency fees under federal fee-shifting statutes. 483 U.S. at 714. The court split along the lines of *Rapanos* with four Justices in the plurality, four Justices in the dissent, and Justice O'Connor's lone concurrence in the judgments. *Id.* at 731. The Third Circuit thus determined that "[b]ecause the four dissenters would allow contingency multipliers in all cases in which Justice O'Connor would allow them, her position commands a majority of the Court" and is controlling. *Student Pub.*, 842 F.2d at 1451.

In *King v. Palmer*,[27] however, the D.C. Circuit took a different approach. The D.C. Circuit refused to examine the points of commonality among Justice O'Connor's opinion and that of the dissent, relying mainly on a literal reading of *Marks* that the holding is the position of the Justices "who concurred in the judgments on the narrowest grounds." 950 F.2d at 783. The D.C. Circuit also relied on the fact that this Court had not explicitly applied *Marks* in a way that would combine concurring and dissenting votes. *Id.*

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[25] 842 F.2d 1436, 1438–39 (3d Cir. 1988).
[26] 483 U.S. 711 (1987).
[27] 950 F.2d 771 (D.C. Cir. 1991).

United States v. Robison

In *United States v. Robison*, a pipe manufacturer was convicted for discharging wastewater into a nearby waterway in violation of its Clean Water Act discharge permit. 505 F.3d 1208, 1211 (11th Cir. 2007). On appeal, the defendants argued the jury should have been instructed that the government must establish jurisdiction based solely on the *Rapanos* plurality and not on the Kennedy concurrence. *Id.* at 1219. The Eleventh Circuit rejected *Johnson*'s either/or approach and adopted the *Gerke* holding that the Kennedy opinion was the "narrowest grounds" and controlling under *Marks*, because it was the least restrictive of federal authority. *Id.* at 1221–22. The court's *Marks* analysis is instructive, albeit flawed.

First, the court observed it would be a rare case in which the plurality test is met and the Kennedy test is not. *See id.* at 1220. And, "as a practical matter" such rare cases can be dismissed. *Id.* This concedes that the plurality test is a subset of the Kennedy test and under *Marks* should control. But the Eleventh Circuit accepted the Seventh Circuit's assertion that the "narrowest grounds" is the opinion least restrictive of federal authority—a proposition that finds no support in this Court's case law. The Eleventh Circuit did not address how that rule would apply when the government is not a party and cited no authority for that interpretation other than *Gerke*'s ipse dixit to the same effect.

Second, the Eleventh Circuit rejected the First Circuit's reliance on the *Rapanos* dissent in *Johnson*.

See Robison, 505 F.3d at 1220–21. After stating that *Marks* applies only to "those Members who concurred in the judgments," the court acknowledged, "[w]e simply cannot avoid the command of *Marks*." *Id.* at 1221. Moreover, the court held that dissenters, by definition, have not joined in the judgment. *Id.* Therefore, "[i]n [the court's] view, *Marks* does not direct lower courts interpreting fractured Supreme Court decisions to consider the positions of those who dissented." *Id.* The court took this one step further, citing the D.C. Circuit in *King v. Palmer*: "We do not think we are free to combine a dissent with a concurrence to form a *Marks* majority." *Id.* (citing *King*, 950 F.2d at 783). "It would be inconsistent with *Marks*," the Eleventh Circuit continued, "to allow the dissenting *Rapanos* Justices to carry the day and impose an 'either/or' test, whereby the CWA jurisdiction would exist when either Justice Scalia's test or Justice Kennedy's test is satisfied." *Id.* The court simply deemed the votes of the dissenters as "of no moment under *Marks*." *Id.*

United States v. Cundiff

United States v. Cundiff involved landowners who were held to be in violation of the CWA for dredging and filling wetlands without a permit. 555 F.3d 200, 204–05 (6th Cir. 2009). The trial court imposed an injunction against the Cundiffs to restore the property and assessed a civil fine. *Id.* at 205. The Cundiffs challenged federal jurisdiction on appeal arguing the plurality decision is controlling because it is the most restrictive of government authority. *Id.* at 209.

The Sixth Circuit rejected the Cundiffs' argument stating "*Marks* does not imply that the 'narrowest' *Rapanos* opinion is whichever one restricts

jurisdiction the most." *Id.* The court also rejected the "least restrictive of government power" approach favored in *Gerke*, *River Watch*, and *Robison*. *Id.* ("[It] makes little sense for the 'narrowest' opinion to be the one that restricts jurisdiction the least . . . ."). Properly read, the Sixth Circuit held, the "'narrowest' opinion refers to the one which relies on the least doctrinally 'far-reaching-common ground' among the Justices in the majority: it is the concurring opinion that offers the least change to the law." *Id.* However, the court did not apply this test to the *Rapanos* decision.

According to the Sixth Circuit, the controlling opinions in *Memoirs* and *Furman* were "less doctrinally sweeping" than the other concurring opinions as adduced by the fact that, in *Memoirs*, the controlling opinion disagreed that obscenity laws per se violate the Constitution, while, in *Furman*, the controlling opinion disagreed that the death penalty was per se unconstitutional. *Cundiff*, 555 F.3d at 209. Because of this, the Sixth Circuit concluded *Memoirs* and *Furman* were an easy fit for *Marks*. *Id.* However, the court asserted *Marks* is problematic if one opinion does not fit within the broader circle drawn by others. *Id.*

Based on this approach, the Sixth Circuit declared *Marks* inapplicable to *Rapanos* because "there is quite little common ground between Justice Kennedy's and the plurality's conception of jurisdiction under the Act, and both flatly reject the other's views." *Id.* at 210. Therefore, the court abandoned *Marks* and adopted the view of the First Circuit in *Johnson* that there is no controlling opinion in *Rapanos* and the government can establish jurisdiction under either the plurality test or the Kennedy test. *Id.*

Other circuits have adopted the reasoning of the First Circuit without adding anything to the *Marks* analysis. The Eighth Circuit in *United States v. Bailey*[28] and the Third Circuit in *United States v. Donovan*[29] both adhere to the conclusion and reasoning in *Johnson* that *Marks* cannot be applied to *Rapanos* because neither opinion is a subset of the other; therefore jurisdiction can be established under the either/or test. *Johnson*, 467 F.3d at 66. And here the matter stood until two very recent decisions of the Ninth Circuit muddied the waters further.

United States v. Davis

The Ninth Circuit's decision in *United States v. Davis*, 825 F.3d 1014 (9th Cir. 2016) (en banc), does not address *Rapanos*, but it provides a refined perspective on *Marks*, which could be applied to *Rapanos*. In *Davis*, the court examined the 4-1-4 decision in *Freeman*. To determine the controlling opinion, the Ninth Circuit started with the statement in *Marks*:

> When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.

Davis, 825 F.3d at 1020.

The court observed that after forty years, the courts are still struggling "to divine what the Supreme Court meant by the 'narrowest grounds.'" *Id.* As a

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[28] *United States v. Bailey*, 571 F.3d 791, 799 (8th Cir. 2009).
[29] *United States v. Donovan*, 661 F.3d 174, 181 (3d Cir. 2011).

result, two approaches have emerged. One is the reasoning-based approach whereby the court seeks to determine if there is a common reasoning among the concurring opinions such that one is a logical subset of the other, broader opinion. *Id.* "In essence, the narrowest opinion must represent a common denominator of the Court's reasoning; it must embody a position implicitly approved by at least five Justices who support the judgment." *Id.* The other approach is results-based and defines "narrowest grounds" as "the rule that would necessarily produce results with which a majority of Justices in the controlling case would agree." *Id.* at 1021. Of the two, the Ninth Circuit preferred the reasoning-based approach:

> To foster clarity, we explicitly adopt the reasoning-based approach to applying Marks. This approach is not only consistent with our most recent case law, [] but also makes the most sense. A fractured Supreme Court decision should only bind the federal courts of appeal when a majority of the Justices agree upon a single underlying rationale and one opinion can reasonably be described as a logical subset of the other. When no single rationale commands a majority of the Court, only the specific result is binding on lower federal courts.

Id. at 1021–22 (citation omitted).

But this approach to *Marks* did not help the court define the "narrowest grounds" in *Davis*. To the contrary, the court found the concurring opinions mutually exclusive in most cases; neither the plurality nor the lone concurrence is a subset of the other. *Davis*, 825 F.3d at 1022. Therefore, a standard *Marks*

analysis does not fit. Although *Marks* expressly limits the analysis to concurring opinions, the Ninth Circuit cited examples where some courts, including the Supreme Court, had looked to the dissent to find a majority. *Id.* at 1024–25 (reserving question of whether dissents can be consulted, since *Freeman* dissent did not change result); *see Marks*, 430 U.S. at 193. Yet the *Davis* court determined that even that approach was unavailing in *Freeman* because neither the plurality position nor the lone concurrence is a logical subset of the dissent, or vice versa. *Davis*, 825 F.3d at 1025. The court acknowledged some overlap among the opinions but found no case in which one opinion would always agree with another. *Id.* Accordingly, the court decided *Marks* could not be applied: "[s]imply put, no combination of *Freeman*'s dissenting and concurring opinions yields a binding rule that we must follow." *Id.*

In the absence of a controlling opinion, the Ninth Circuit concluded it could choose the opinion it found most persuasive, limited only by the result in the case that a defendant relying on a plea agreement is not categorically barred from taking advantage of a sentence reduction under the Guidelines. *Id.* In the end, the court found the plurality the most persuasive and applied that opinion to the case. *Id.* at 1028.

Under the *Davis* approach, the court must first determine whether the reasoning of the plurality and the Kennedy opinion is a logical subset of the other. *Id.* at 1016. The plurality in *Rapanos* reasoned that a jurisdictional wetland must have the characteristics of the wetland regulated in *Riverside Bayview*. *Rapanos*, 547 U.S. at 742; *see United States v. Riverside Bayview Homes Inc.*, 474 U.S. 121, 134–35

(1985). That is, it must be "indistinguishable" from the abutting waterway, not merely connected. *Rapanos*, 547 U.S. at 755. Justice Kennedy acknowledged that such a wetland is subject to federal regulation under *Riverside Bayview*. *Id.* at 765–67; *see Riverside Bayview*, 474 U.S. at 134–35. Therefore, the plurality opinion is a logical subset of the Kennedy opinion. But the converse is not true. The plurality rejected Justice Kennedy's "significant nexus" test where the wetland is not "indistinguishable" from the abutting waterway as in *Riverside Bayview*. *Rapanos*, 547 U.S. at 753–56; *see Riverside Bayview*, 474 U.S. at 134–35. The Kennedy test is broader than the plurality test for wetlands such that the Kennedy test encircles the plurality test in all cases. This is different from *Freeman* where the reasoning of the concurring opinions was not the logical subset of another. Therefore, under a straightforward application of *Marks* as applied by *Davis*, the plurality opinion in *Rapanos* is controlling.

But post-*Davis*, the Ninth Circuit made quick work of reaffirming its prior holding in *River Watch II* that the Kennedy concurrence controls.

United States v. Robertson

Following its decision in *Davis*, the Ninth Circuit addressed whether *Davis* had undermined *River Watch II* in *United States v. Robertson*, 875 F.3d 1281 (9th Cir. 2017). Appellant Robertson argued that *Davis* undermined the Ninth Circuit's prior decision in *River Watch II*, which lacked any of the detailed *Marks* analysis called for by *Davis*. *Robertson*, 875 F.3d at 1290. The Ninth Circuit held that *River Watch II* remained the law of the circuit, on the express ground that Justice Kennedy's opinion is a logical

subset of the *Rapanos* dissent. *Id.* at 1292 (citing *Gerke*'s discussion of the *Rapanos* dissent). *Robertson* thus creates an express circuit split with the D.C. Circuit's decision in *King v. Palmer*, discussed above, on whether dissents may form the "larger set" for *Marks* purposes. *See also Robertson*, 875 F.3d at 1289–90 (cataloging wide circuit splits on how to apply *Rapanos*).[30]

III

JUDICIAL POLICY ON PLURALITIES: WORKING TOWARD MAJORITIES

Although plurality decisions from the Court were historically rare, they have grown more frequent since the mid-twentieth century.[31] As many Court watchers have observed, plurality decisions often occur in cases involving especially difficult and highly salient legal issues on which public opinion is sharply divided.[32] Some of the most significant and divisive Supreme

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[30] When this Court granted certiorari in this case, the Ninth Circuit stayed its mandate in *Robertson* and ordered further briefing on the effect of this Court's decision in this case on the disposition of Mr. Robertson's case. *United States v. Robertson*, No. 16-30178, Dkt # 82 (9th Cir. Dec. 21, 2017).

[31] *See* James F. Spriggs II & David R. Stras, *Explaining Plurality Decisions*, 99 Geo. L.J. 515, 519 (2011) (reporting that the Supreme Court issued only 45 plurality decisions between 1801 and 1955 but issued 195 plurality decisions between 1953 and 2006).

[32] *See, e.g.*, Pamela C. Corley, *Uncertain Precedent: Circuit Court Responses to Supreme Court Plurality Opinions*, 37 Am. Pol. Res. 30, 32 (2009) ("[P]lurality decisions are important to study because they tend to occur in highly salient issue areas such as civil liberties and civil rights." (citation omitted)); Spriggs & Stras, *supra* note 31, at 527 ("[P]lurality decisions tend to occur in difficult and highly salient cases . . . .").

Court cases in recent history—involving such issues as abortion,[33] gun control,[34] voting rights,[35] affirmative action,[36] capital punishment,[37] and the scope of congressional authority under the Commerce Clause[38]—have been decided by plurality decision. At the same time, the effects of plurality decisions extend well beyond such high-profile contexts. The proper interpretation of plurality precedent also matters for a variety of less prominent legal issues that nonetheless carry substantial importance to the workaday business of the federal courts, such as

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[33] *See Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992); *Webster v. Reprod. Health Servs.*, 492 U.S. 490 (1989).

[34] *See McDonald v. City of Chicago*, 561 U.S. 742 (2010) (concerning incorporation of the Second Amendment against state governments).

[35] *See, e.g., Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181 (2008) (challenging Indiana's voter identification law).

[36] *See, e.g., City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (challenging the constitutionality of racial preferences in public contracting); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (challenging racial preferences in higher education).

[37] *See, e.g., Baze v. Rees*, 553 U.S. 35 (2008) (addressing the permissible methods of capital punishment); *Gregg v. Georgia*, 428 U.S. 153 (1976) (reaffirming capital punishment's constitutionality).

[38] *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012) (challenging Congress's authority to require that certain individuals either acquire health insurance or pay a penalty).

criminal procedure,[39] sentencing,[40] personal jurisdiction,[41] class certification,[42] and federal preemption of state law.[43]

Recognizing that the government, people, and courts rely on stability and predictability in the law, several Justices have expressed concern that the Court's plurality decisions leave lower courts and litigants with insufficient guidance. *See, e.g.*,

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[39] *See, e.g., United States v. Duron-Caldera*, 737 F.3d 988, 994 & n.4 (5th Cir. 2013) (noting the difficulty of applying the narrowest grounds rule to discern the Supreme Court's holding in *Williams v. Illinois*, 567 U.S. 50 (2012), regarding whether particular statements prepared in the course of an investigation were "testimonial" for purposes of the Sixth Amendment's Confrontation Clause); *United States v. James*, 712 F.3d 79, 95-96 (2d Cir. 2013) (noting the same difficulty).

[40] *See, e.g., In re Sealed Case*, 722 F.3d 361, 365 (D.C. Cir. 2013) (noting the divergence of lower court opinion regarding proper interpretation of the federal sentencing guidelines resulting from differing understandings of the Supreme Court's plurality decision in *Freeman v. United States*, 564 U.S. 522 (2011)).

[41] *See, e.g., Ainsworth v. Moffett Eng'g, Ltd.*, 716 F.3d 174, 178 (5th Cir. 2013) (applying *Marks* analysis to the Supreme Court's plurality decision in *J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 873 (2011)); *AFTG-TG, LLC v. Nuvoton Tech. Corp.*, 689 F.3d 1358, 1363 (Fed. Cir. 2012) (per curiam) (engaging in the same inquiry).

[42] *See, e.g., In re Packaged Ice Antitrust Litig.*, 779 F. Supp. 2d 642, 659-60 (E.D. Mich. 2011) (applying *Marks* to determine the holding of the Supreme Court's plurality decision in *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 559 U.S. 393 (2010)); *McKinney v. Bayer Corp.*, 744 F. Supp. 2d 733, 746–47 (N.D. Ohio 2010) (engaging in the same analysis).

[43] *See, e.g., Kemp v. Medtronic, Inc.*, 231 F.3d 216, 218, 224 & n.1 (6th Cir. 2000) (applying *Marks* to determine the precedential effect of the Supreme Court's plurality decision in *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996)); *In re Medtronic, Inc. Sprint Fidelis Leads Prods. Liab. Litig.*, 592 F. Supp. 2d 1147, 1151 n.4 (D. Minn. 2009) (parsing the same opinion).

William H. Rehnquist, *Remarks on the Process of Judging*, 49 Wash. & Lee L. Rev. 263, 270 (1992) ("There must be an effort to get an opinion for at least a majority of the Court in every case where that is possible, in order that lower court judges and the profession as a whole may know what the law is without having to go through an elaborate head-counting process."); Judge Ruth Bader Ginsburg, *Remarks on Writing Separately, Jurisprudential Lecture at the University of Washington School of Law (May 11, 1989)*, 65 Wash. L. Rev. 133, 148 (1990) (describing the "proliferation" of decisions without a clear majority as "unsettling"); Justice Lewis F. Powell, Jr., *Stare Decisis and Judicial Restraint, Leslie H. Arps Lecture at the Association of the Bar of the City of New York (Oct. 17, 1989)*, 47 Wash. & Lee L. Rev. 281, 289 (1990) ("Splintered decisions provide insufficient guidance for lower courts . . . [and] promote disrespect for the Court as a whole . . . ."). And similar reservations regarding the workability of the *Marks* framework itself have found their way into the Court's opinions *E.g.*, *Nichols v. United States*, 511 U.S. 738, 745–46 (1994) (noting difficulties lower courts had encountered in seeking to apply *Marks* to the Court's fractured opinion in *Baldasar v. Illinois*, 446 U.S. 222 (1980), and concluding that "[w]e think it not useful to pursue the *Marks* inquiry to the utmost logical possibility when it has so obviously baffled and divided the lower courts which have considered it"); accord *Grutter v. Bollinger*, 539 U.S. 306, 325 (2003) (reaching a similar conclusion regarding lower courts' interpretation of *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978)).

The discussion of *Rapanos* provides a vivid example of the adverse impacts that uncertainty and

unpredictability have on the public. *See* Spriggs & Stras, *supra* note 31, at 529 ("Clear, understandable precedent is necessary to 'reduce [] transaction costs and wasted judicial effort, and encourage[] like cases to be treated alike—the bedrock of equality and fairness.'" (quoting Michael L. Eber, Comment, *When the Dissent Creates the Law: Cross-Cutting Majorities and the Prediction Model of Precedent*, 58 Emory L.J. 207, 233 (2008))).

Inconsistency and unpredictability in the law is harmful to the public interest in that it promotes ad hoc governance. Take, for example, the First Circuit's conclusion in *United States v. Johnson* that the government can establish CWA jurisdiction by satisfying either the Kennedy or the Scalia plurality test. In *Hawkes v. United States*,[44] the Army Corps of Engineers issued a Jurisdictional Determination asserting federal jurisdiction based on the Scalia plurality test.[45] When the landowners challenged the determination in an administrative setting, the Corps changed tactics, asserting for the first time that the wetlands at issue were subject to federal control under the Kennedy "significant nexus" test, which burdened the landowners with unnecessary delay and expense.[46] An interpretation that allows agencies and courts to follow two different legal tests creates uncertainty among the regulated public and legal practitioners. It also allows the government to play legal games with alleged violators of the CWA. This

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[44] *Hawkes Co. v. U.S. Army Corps of Eng'rs*, 963 F. Supp. 2d 868 (D. Minn. 2013).
[45] *Id.* at 871.
[46] *Id.*

Court's clarification of *Marks* is necessary to protect against the risk of arbitrary and ad hoc governance.

IV

THIS COURT'S CLARIFICATION OF *MARKS* WOULD GET THE CIRCUIT COURTS BACK ON TARGET

This Court could substantially reduce the confusion that attends the lower courts' efforts to apply cases like *Freeman* and *Rapanos* by clarifying *Marks*, based on the above discussed shortcomings in how *Marks* is currently applied.

First, this Court should hold that dissenting opinions in its decisions may not be used as the "larger set" in identifying the narrowest grounds under *Marks*. For all the reasons stated above, including the text of the *Marks* decision, only those opinions supporting the judgment of this Court should be canvassed to determine the holding of a fractured decision.

Second, this Court should hold that when applying *Marks*, the result is either that one opinion supporting the judgment is the holding, or that none are. As discussed above, cases like *United States v. Johnson*, which state that both the plurality or the concurrence in *Rapanos* are the holding of the case, fly directly in the face of *Marks'* charge to identify the narrowest ground for the decision. If a four Justice plurality is a narrower decision than a single Justice concurrence, than the plurality is the holding under *Marks*. But logic prevents each from being narrower than the other. If each opinion nested completely within the other, they would not be separate opinions. This Court should admonish lower courts to identify

the narrowest grounds, if possible, which can only yield one opinion, or none, as the holding under *Marks*.

Third, this Court should caution lower courts against adopting single-Justice opinions as the holding of the Court under a *Marks* analysis when that opinion is expressly critiqued by all the other members of the Court. The circuit courts may do this in two contexts. First, the lower court might consider a single opinion to be the narrowest ground supporting the judgment. But a single opinion whose methodology or conclusions are strongly criticized by the plurality is unlikely to be a logical subset of the plurality (particularly where the concurrence is conceptually closely related to the dissent). And opinions criticized by the other eight Justices, but which nonetheless are taken by the lower courts as the holding of a case, stand the institution of a majoritarian Supreme Court on its head.

Alternatively, a lower court might conclude under *Marks* that a decision has no holding, and wish to adopt a single-Justice concurrence as the "most persuasive" opinion. But the notion of the lower appellate courts determining that a single-Justice opinion, which persuaded no other member of this Court, is nonetheless the law of the land because it is the most persuasive, raises the level of irony in the *Marks* exercise to dangerous levels.

Fourth, this Court should instruct lower courts to disregard whether opinions constrain government power more or less when applying *Marks*. As noted above, this question has no bearing on cases in which the government is not a party. It is entirely unclear why the government, of all parties, should benefit

from such a finger on the scales of justice. It is also entirely inconsistent with the federal judiciary's responsibility to protect the individual liberties of this nation's citizens from government overreach. Further, such an approach makes even less sense when one considers that many statutes which this Court construes (such as the Clean Water Act) can be enforced either privately or by the government. Are lower courts to say that for private enforcement of the Clean Water Act, the *Rapanos* plurality is the holding, but that the concurrence is controlling when the government enforces?

Fifth, this Court could guide lower courts in their application of *Marks* by focusing their attention more closely on the specific question being answered in fractured decisions. While this may continue to yield elusive results in constitutional cases, it should prove fruitful in cases of statutory interpretation. In particular, this Court could hold that when one of its fractured decisions involves interpretation of a federal statute, then lower courts are to look to the narrowest interpretation of that statute among the opinions supporting the judgment.

Finally, this Court could instruct lower courts to be more content with "half-a-holding": in some decisions there is a clear level of agreement among a plurality and a concurrence which could prove helpful in many if not all cases. For example, in a statutory interpretation case like *Rapanos*, the lower courts should focus on the fact that both the plurality and the concurrence interpret the phrase "waters of the United States" as part of the statutory text, and conclude that the agency regulations interpreting the same text are too broad and therefor invalid. Five

Justices voting that a particular regulation is invalid (especially where, as in *Rapanos*, the dissent would have upheld the regulation under *Chevron* deference) is a significant result which lower courts can easily apply in particular cases, despite the lack of agreement on why they are invalid.

CONCLUSION

This Court should clarify *Marks* as described above, to improve uniformity in the Circuit Courts where this Court cannot reach a majority, and to raise this Court's incentives for majority decisions.

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Respectfully submitted,

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